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Supreme Court, U.S.
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In The
Supreme Court of the United States

MARTIN PATRICK SHEEHAN, TRUSTEE,

Petitioner,

v.

SCOTT LEMOYNE JACKSON,
THE STATE OF WEST VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. Is 11 U.S.C. § 522(b)(1) a grant of authority to, and or congressional ratification of an independent power of, States to enact exemption schemes that only operate within the context of a bankruptcy proceeding?

2. Is the exemption scheme established in W.Va. Code § 38-10-4, a scheme of exemptions that can only apply in bankruptcy proceedings, preempted under the Supremacy Clause, Article VI of the Constitution, given that the power to establish "uniform laws on the subject of bankruptcies" was vested in the Congress under Article I, Section 8, clause 4, while the power to enact legislation impairing the obligation of contracts was prohibited to the States under Article I, Section 10?

List of All Parties to the Proceeding

The parties to this proceeding are all listed in the caption.

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Citations of the Official and Unofficial Opinions and Orders

The decision of the United States Court of Appeals for the Fourth Circuit in the proceedings below were made as part of a series of consolidated proceedings involving eight specific cases joined under case no. 08-2202(L). The instant case was docketed at the Court of Appeals as case no. 08-2205. The opinion below was published and is reported a Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009)

The decision of the United States Bankruptcy Court for the Northern District of West Virginia was made as part of a series of consolidated proceedings in twenty-three cases joined under lead case no. 5:08-bk-00519, In re: Morell. The instant case was individually docketed at case no. 5:08-bk-00454. The opinion of the Bankruptcy Court was published, and is reported as In re: Morrell, 394 B.R. 405 (Bankr. N.D. W.Va. 2008). Said opinion is included in the appendix. The opinion in the Morrell case was cited in the order entered in In re: Scott LeMoyne Jackson, 5:08-bk-00454.

Concise Statement of the Basis for Jurisdiction

Judgment was rendered by the United States Court of Appeals for the Fourth Circuit on July 24, 2009. There was no request for a rehearing.

This court has jurisdiction for consideration of a petition for certiorari pursuant to 28 U.S.C. § 1254(1).

The instant case constitutes a challenge to the constitutionality of a state statute, W.Va. Code § 38-10-4. The Attorney General of the State of West Virginia was notified of the challenge to that statute in the Bankruptcy Court. At that time, the Attorney General chose to intervene in the case, and the State of West Virginia is now a party to the proceedings.

Constitutional and Statutory Provisions at Issue

Article I, Section 8, Clause 4

> The Congress shall have Power
>
> . . . .
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Article I, Section 10

> No State shall . . .. pass any . . . Law impairing the Obligation of Contracts. . . .

Article VI

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State

shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

11 U.S.C. § 522

(a) In this section -

(1) "dependent" includes spouse, whether or not actually dependent; and

(2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.

(b)(1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this

subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is –

> (A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-

day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and ;

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986. If the effect of the domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has

received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that –

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii)(I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable

requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that -

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except –

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a) (in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

(2) a debt secured by a lien that is-

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive -

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless–

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to –

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $15,000, on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or

(E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.

(12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986.

. . . .

W. Va. Code § 38-10-4. Exemptions of property in bankruptcy proceedings

Pursuant to the provisions of 11 U.S.C. § 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the

property specified under the provisions of 11 U.S.C. § 522(d).

Any person who files a petition under the federal bankruptcy law may exempt from property of the estate in a bankruptcy proceeding the following property:

(a) The debtor's interest, not to exceed twenty-five thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence or in a burial plot for the debtor or a dependent of the debtor: Provided, That when the debtor is a physician licensed to practice medicine in this state under article three or article fourteen, chapter thirty of this code, and has commenced a bankruptcy proceeding in part due to a verdict or judgment entered in a medical professional liability action, if the physician has current medical malpractice insurance in the amount of at least one million dollars for each occurrence, the debtor physician's interest that is exempt under this subsection may exceed twenty-five thousand dollars in value but may not exceed two hundred fifty thousand dollars per household.

(b) The debtor's interest, not to exceed two thousand four hundred dollars in value, in one motor vehicle.

(c) The debtor's interest, not to exceed four hundred dollars in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor: Provided, That the total amount of personal property exempted under this subsection may not exceed eight thousand dollars.

(d) The debtor's interest, not to exceed one thousand dollars in value, in jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(e) The debtor's interest, not to exceed in value eight hundred dollars plus any unused amount of the exemption provided under subsection (a) of this section in any property.

(f) The debtor's interest, not to exceed one thousand five hundred dollars in value, in any implements, professional books or tools of the trade of the debtor or the trade of a dependent of the debtor.

(g) Any unmeasured life insurance contract owned by the debtor, other than a credit life insurance contract.

(h) The debtor's interest, not to exceed in value eight thousand dollars less any amount of property of the estate transferred in the manner specified in 11 U.S.C. '542(d), in any accrued dividend or interest under, or loan value of, any unmeasured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(i) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(j) The debtor's right to receive:

(1) A social security benefit, unemployment compensation or a local public assistance benefit;

(2) A veterans' benefit;

(3) A disability, illness or unemployment benefit;

(4) Alimony, support or separate maintenance, to the

extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(5) A payment under a stock bonus, pension, profit sharing, annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and funds on deposit in an individual retirement account (IRA), including a simplified employee pension (SEP) regardless of the amount of funds, unless:

(A) The plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose;

(B) The payment is on account of age or length of service;

(C) The plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408 or 409

of the Internal Revenue Code of 1986; and

(D) With respect to an individual retirement account, including a simplified employee pension, the amount is subject to the excise tax on excess contributions under Section 4973 and/or Section 4979 of the Internal Revenue Code of 1986, or any successor provisions, regardless of whether the tax is paid.

(k) The debtor's right to receive or property that is traceable to:

(1) An award under a crime victim's reparation law;

(2) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(3) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on

the date of the individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(4) A payment, not to exceed fifteen thousand dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent;

(5) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(6) Payments made to the prepaid tuition trust fund or to the savings plan trust fund, including earnings, in accordance with article thirty, chapter eighteen of this code on behalf of any beneficiary.

Statement of the Case

Originally, the Petitioner, a chapter seven trustee, filed objections to exemptions in twenty-three cases for which meetings of creditors were held in May of 2008. In those cases, the trustee objected that debtors could not use exemptions contained in W.Va. Code § 38-10-4, because that statute was preempted under federal law. The Attorney General of the State of West Virginia was notified and intervened to advocate for the validity of the statute being challenged by the trustee. On August 14, 2008, the Bankruptcy Court denied the objection filed by the trustee and sustained the validity of the questioned statute. The trustee filed a direct appeal to the United States Court of Appeals for the Fourth Circuit in eight of the cases. On July 24, 2009, the ruling of the Bankruptcy Court was affirmed. The instant case is one of the eight cases.

Statement of Facts

In a case filed under Chapter 7 of the Bankruptcy Code, a single debtor, or married persons who file jointly, must complete and file several documents. These include the Petition for Relief to which various Schedules are attached. Debtors must list on Schedule A all of their real property, and on Schedule B all of their personal property. On both of these lists, the debtors describe their assets and provide an estimate of value for each. On Schedule C, debtors provide a list of property claimed to be exempt, the amount claimed as exempt, and provide a statutory reference under which the exemption is claimed. On Schedule D,

debtors describe their secured debts and the property encumbered by such a debt.

Generally when natural persons file for relief, they have two theoretical choices to make on Schedule C. The choice is authorized by 11 U.S.C. § 522(b)(1). Debtors could choose to use certain exemptions provided in 11 U.S.C. § 522(b)(2) and (d), generally referred to by bankruptcy practitioners as the "federal exemptions," or could choose to use the exemptions referred to in 11 U.S.C. § 522(b)(3). The (b)(3) exemptions are exemptions which exist at state law, under federal laws other than under the Bankruptcy Code, and in certain retirement monies. Although the (b)(3) exemptions encompass more exemptions than those available at state law, generally such exemptions are referred to by bankruptcy practitioners as "state exemptions" or as the exemptions of a particular state, i.e., "the West Virginia exemptions."

As noted, the apparent choice of exemption schemes is sometimes only theoretical. Section 522(b)(2) of title 11 authorized States to deny debtors access to the federal exemptions provided in the Bankruptcy Code. States that have enacted such legislation are generally said to have "opted out." West Virginia is such a state.

However, the section of the West Virginia Code which contains the opt out language does more than opt out. In addition, the statute contains a series of exemptions modeled on those contained in the Bankruptcy Code, for use by residents of West Virginia exclusively in bankruptcy proceedings. As a

practical matter, West Virginia has denied access to the federal exemption scheme provided for under the Bankruptcy Code, and substituted a different bankruptcy-only scheme of its own design as a substitute. The issues raised herein question whether West Virginia may proceed in this fashion.

The details of the instant case are that this single debtor claimed exemptions inter alia, in the following property: his residence -$5,000; and six additional parcels of real estate-$ 24,003. Under the West Virginia bankruptcy only exemption law, the debtor purported to claim exemptions under W.Va. Code § 38-10-4(a) and (e) to exempt all of this property.

Without recourse to these exemptions, the debtor could not exempt all of this property. Under the provisions of West Virginia law applicable in judgment lien proceedings, only $5,000 could be exempted. See W.Va. Code § 38-9-1.

If restricted to the federal exemption scheme that exists under the Bankruptcy Code, the debtor would not have sufficient exemptions. On the property other than the residence, the debtor would retain an exemption under § 522(d)(5) of only $1,075 plus the unused exemption up to $10,125 or a total of $ 11,200.

Summary of the Argument

While Congress authorized States to bar access to the exclusive scheme of federal exemptions established under the Bankruptcy Code, Congress

did not authorizes States to bar access and create an independent State enacted bankruptcy only exemption scheme. By enacting a federal bankruptcy only exemption scheme, Congress preempted all other such schemes. It is unlikely Congress had the authority to delegate to States the ability to adopt such schemes, given the need for uniform bankruptcy laws, and the constitutional prohibition on state laws which impair contracts. State enacted bankruptcy only schemes are inconsistent with the Bankruptcy Code and are preempted.

Argument

A.

Over the years, Congress has taken different approaches to defining what property a debtor should be able to retain, or exempt, after filing for bankruptcy relief. In the earliest statute, exemptions were defined in the bankruptcy law. Chap. XIX, April 4, 1800, 2 Stat. 19, *repealed* Chap. VI, December 19, 1803. Under the Bankruptcy Act of 1898, 30 Stat. 544, the assets which a debtor could exempt in a bankruptcy proceeding were those which were declared exempt under other federal laws, and under state law where a debtor was domiciled. The exemptions at state law often included homestead exemptions, and were generally the kind of exemptions that a debtor would be entitled to in proceedings brought by judgement lien debtors to collect money.

When the Bankruptcy Code was being considered there was considerable debate about how

to define exemptions. Generally, the House of Representatives appeared to favor a return to the use of a federal scheme, while the Senate appeared to favor the continued practice of defining exemptions at state law.[1] The stalemate was resolved by the "historic compromise" that is section 522(b). This section permitted a choice between the use of a newly enacted set of federal bankruptcy exemptions, or use of the non-bankruptcy law exemptions that had been the standard under the Bankruptcy Act. The compromise included one other unusual provision. States were given the power to prohibit a debtor from using the newly enacted federal bankruptcy exemptions in what is now 11 U.S.C. § 522(b)(2). That statute provides,

> Property listed in this paragraph is property that is specified under subsection (d)[the federal bankruptcy scheme], unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

The power of a State to "opt out" of the federal bankruptcy scheme is not in dispute. Congress has specifically authorized such conduct.

As noted, barring a debtor from access to the newly enacted federal bankruptcy exemptions did not eliminate access to all exemptions. Instead, a debtor was limited, much as had been the case under

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[1] A comprehensive recitation of the legislative history of the exemption provisions of the Bankruptcy Code was detailed in In re: Neihiesel, 32 B.R. 146 (Bankr. D. Utah 1983).

the Bankruptcy Act, to those exemptions provided for in other federal laws, or under State law. The petitioner does not dispute that a debtor can make use of such exemptions, available to both judgement lien debtors, and bankrupts, alike.

What is at stake here, is whether section 522(b) contemplated State legislation that did more than "opt out." Can a State, like West Virginia, both opt out of the federal bankruptcy scheme, and provide debtors with an alternate exemption scheme that only operates within the context of a bankruptcy proceeding. The trustee contends that States lack authority under section 522 to enact bankruptcy only schemes, and asserts that the Constitution prohibits delegation of the authority to write such legislation to the States.

B.

When a State purports to write an exemption law that operates only in bankruptcy proceedings, it limits property which might be administered for the benefit of creditors in bankruptcy proceedings, which could be seized by creditors outside of bankruptcy proceedings. The facts of the instant case are illustrative. The debtor has claimed exempt six lots of real estate in the total amount of $24.003. Under the federal bankruptcy scheme, the debtor would not have been able to exempt more than $11,200 in the lots. Under other provisions of West Virginia law, W.Va. Code § 38-9-1, the debtor's sole real estate exemption of $5,000 would have fully consumed in judgment proceedings for the debtor's residence, and

the entire value of the lots would have been available to creditors.

Absent the imprimatur of Congress, States cannot act to interfere with, or complement the Nation's bankruptcy laws. International Shoe v. Pinkus, 278 U.S. 261 (1929) and Perez v. Campbell, 402 U.S. 637 (1971). In In re: Cross, 255 B.R. 25 (Bankr. N.D. Ind. 2000), Judge Grant reasoned that an Indiana bankruptcy only exemption scheme interfered with the balance struck by Congress between debtors and creditors. He distinguished general State exemption schemes from a State created bankruptcy only scheme. He described permitting exemptions under laws of the first type as a recognition of non-bankruptcy entitlements established under other laws. Inside bankruptcy or outside of bankruptcy, the rights of creditors and debtors remained much the same.

But Judge Grant described bankruptcy only schemes as qualitatively different. Such statutes alter the balance between the collection powers of a creditor and the fresh start opportunity of a debtor. He found that such schemes would interfere with the full effectiveness of the balance struck by Congress between these parties in violation of International Shoe v. Pinkus, and Perez v. Campbell.

Similarly, in In re: Regevig, 389 B.R. 736 (Bankr. D. Ariz. 2008) Judge Haines found a California exemption scheme to have been preempted. He reasoned that Congress had enacted a "bankruptcy only" scheme as 11 U.S.C. § 522(d) and had thus preempted the field of exclusive

bankruptcy only exemptions in the process. Efforts by California to create a different bankruptcy only scheme was consequently prohibited.

In two cases which Court of Appeals have considered, the use of a "bankruptcy only" rule has been found improper. In In re: Kanter, 505 F.2d 228 (9th Cir. 1974) a California effort to deprive a bankruptcy trustee of the ability to administer a specific form of an asset, a personal injury suit that general creditors could reach outside of the bankruptcy context, was found to be an interference with federal law. Similarly, in HSBC Bank USA v. Branch (In re: Bank of New England Corp.), 364 F.3d 355 (1st Cir. 2004) the Court of Appeals declined to recognize a rule of contract interpretation peculiar to New York which would only apply in the bankruptcy context.

C.

Bankruptcy is a most unusual Congressional power. Not only does the Constitution grant Congress the power to enact bankruptcy laws in Article I, Section 8, clause 4, but the central focus of any bankruptcy legislation,[2] the power to impair obligations under a contract, was ceded by States in Article I, Section 10, clause 1. Without attempting to distinguish between bankruptcy laws and insolvency laws, the Supreme Court did sustain insolvency laws that did not impair contractual obligations during instances in the nineteenth century when no

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[2] Railway Labor Executives Ass'n v. Gibbons, 455 U.S. 457 (1982) and Hanover National Bank v. Moyses, 186 U.S. 181 (1902).

national bankruptcy law was in existence, see Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122 (1819). Still there has been a national bankruptcy law in existence since 1898. The right of states to interfere with, or complement such legislation, has been uniformly disfavored. International Shoe v. Pinkus, supra, and Perez v. Campbell, supra.

D.

The decision of the Court of Appeals for the Fourth Circuit recognizes the significant division of authority, including divisions between the United States Courts of Appeal, on the issues presented herein. Sheehan v. Peveich, 574 F.3d 248, 251 at n.2 (4th Cir. 2009). The issue is one of importance to the administration of the bankruptcy laws.

Frequently, the individual amounts which might be at issue in a given case are small. Given the cost of litigation, such cases often evade review. See e.g., In re: Bloom, 5 B.R. 451 (Bankr. N.D. Oh. 1980)(tax refund of $583.32 at issue in challenge to bankruptcy only scheme); and In re: Vasko, 6 B.R. 317 (Bankr. N.D. Oh. 1980)(exemption of $800 at issue in challenge to bankruptcy only scheme.) Nonetheless, the volume of cases affected by this lingering issue is substantial. Bankruptcy only exemption schemes exist in numerous jurisdictions,

including California,[3] Delaware,[4] Florida,[5] Georgia,[6] Iowa,[7] Kansas,[8] Maryland, [9] Montana,[10] New York,[11] as well as West Virginia.

In 2005, Congress amended 11 U.S.C. § 522(b)(3)(A). While previously the available state exemptions were defined by reference to a debtor's current[12] domicile, it may now be relevant to look to where a debtor was domiciled between 730 and 910 days prior to filing. The need to litigate the nuances of state exemption laws outside the state in which such laws were adopted has grown. See e.g., In re: Regevig, supra, (constitutionality of California exemption scheme at issue in Arizona bankruptcy

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[3] California Code of Civil Procedure § 703.140(b).

[4] 10 Del. Code Ann. § 4914(b) and (c).

[5] Fla. Stat. Ann. § 222.20(personal injury suits exempt in bankruptcy proceedings).

[6] Ga. Code Ann. § 44-13-100.

[7] Iowa Code § 627.6(10) (wages and tax returns in bankruptcy proceedings).

[8] Kan. Stat. Ann. § 60-2312(b) (personal injury suits exempt in bankruptcy proceedings).

[9] Md. Code Ann., Cts. and Jud. Proc. Art., § 11-504(f) (additional $5000 in any property in bankruptcy proceeding.).

[10] Mont. Code Ann. § 31-2-106.

[11] New York Debtor and Creditor § 282 (automobiles exempt in bankruptcy).

[12] The place where the debtor was domiciled for most of the preceding 180 days.

proceeding.) The possibility of inconsistent adjudication is thus on the rise. Review of the instant case would serve to limit the inconsistent possibilities.

Conclusion

WHEREFORE, the undersigned asks that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

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APPENDIX

[ENTERED July 24, 2009]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

No. 08-2202

GEORGE M. PEVEICH,
Debtor-Appellee,

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

JAMES HAROLD MELOTT, JR.;
MARY MARGARET MELOTT, No. 08-2204
Debtors-Appellees,

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

SCOTT LEMOYNE JACKSON,
Debtor-Appellee,

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

No. 08-2205

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

NANCY LOUISE SCHUBERT, a/k/a Nancy Louise Meyers,
Debtor-Appellee,

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

No. 08-2206

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

CANDACE A. CURTIS, a/k/a Candace A. Baker,
Debtor-Appellee,

No. 08-2207

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

CHARLES MICHAEL BAIRD; SHIRLEY JEAN BAIRD,
Debtors-Appellees,

No. 08-2208

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

DANNY G. MORRELL, JR.; RAQUEL L. MORRELL,
Debtors-Appellees,

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

No. 08-2209

MARTIN PATRICK SHEEHAN,
Trustee-Appellant,

v.

CHARLES L. BROWN, JR.; NANCY J. BROWN,
Debtors-Appellees,

STATE OF WEST VIRGINIA,
Intervenor-Appellee.

No. 08-2210

Appeals from the United States Bankruptcy Court for the Northern District of West Virginia, at Wheeling.
Patrick M. Flatley, Chief Bankruptcy Judge.
(5:08-bk-00287; 5:08-bk-00433; 5:08-bk-00454; 5:08-bk-00464; 5:08-bk-00510; 5:08-bk-00518; 5:08-bk-00519; 5:08-bk-00569)

Argued: May 12, 2009

Decided: July 24, 2009

Before TRAXLER, Chief Judge, AGEE, Circuit Judge, and Malcolm J. HOWARD, Senior United States District Judge for the Eastern District of North Carolina, sitting by designation.

Affirmed by published opinion. Senior District Judge Howard wrote the opinion, in which Chief Judge Traxler and Judge Agee joined.

COUNSEL

ARGUED: Martin Patrick Sheehan, SHEEHAN & NUGENT, PLLC, Wheeling, West Virginia, for Appellant. Michael G. Clagett, Bridgeport, West Virginia, for Appellees.

ON BRIEF: Darrell V. McGraw, Jr., Attorney General of the State of West Virginia, Charleston, West Virginia, for Appellee State of West Virginia.

OPINION

HOWARD, Senior District Judge:

The question in these cases is whether the Supremacy Clause renders invalid state property exemptions that apply only in bankruptcy actions. Construing West Virginia Code § 38-10-4, the bankruptcy court held that such exemptions are not rendered invalid by the Supremacy Clause. We affirm that judgment.

I.

We have before us consolidated appeals from eight bankruptcy cases filed by debtors domiciled in West Virginia. In each of the cases, the debtors have claimed all of their property exempt from the bankruptcy estate pursuant to West Virginia Code § 38-10-4. The bankruptcy trustee objected to the claims of exemption, arguing that § 38-10-4 is preempted by federal law. The United States Bankruptcy Court for the Northern District of West Virginia overruled the trustee's objections and allowed the debtors' exemptions. Pursuant to 28 U.S.C. § 158(d)(2)(A), this court authorized the trustee's direct appeal of the bankruptcy court's decision.

II.

Upon commencement of a Chapter 7 bankruptcy proceeding, a debtor's legal and equitable interests in property become part of the bankruptcy estate, subject to administration by the bankruptcy trustee for payment of creditors. 11 U.S.C. §§ 541(a)(1), 704. An individual debtor is allowed, though, to exempt certain property from the bankruptcy estate so as to enable the debtor to start afresh. 11 U.S.C. § 522(b)(1).

The Bankruptcy Code provides two alternative exemption schemes. Unless state law provides otherwise, a debtor may choose to exempt from the estate either property listed in the federal bankruptcy exemptions set forth in § 522(d) of the Bankruptcy Code or property exempt under

applicable state or local law, together with property exempt under federal, nonbankruptcy law. 11 U.S.C. § 522(b)(1). However, § 522(b)(2) of the Bankruptcy Code authorizes the states to opt out of the federal bankruptcy exemption scheme and thereby deny debtors the right to elect the federal bankruptcy exemptions contained in § 522(d). By opting out, a state restricts its debtors to any exemptions available under state or local law and federal, nonbankruptcy law.

In 1981, approximately two years after the Bankruptcy Code became effective, West Virginia opted out of the federal bankruptcy exemption scheme upon enactment of West Virginia Code § 38-10-4. Section 38-10-4 does more than simply opt out of the federal bankruptcy exemption scheme, though. It also establishes a number of exemptions modeled after (but different in certain respects from) those contained in the Bankruptcy Code. While West Virginia has exemptions that apply to judgment debtors generally, the exemptions provided in § 38-10-4 apply only in bankruptcy proceedings.[1] In each of the cases on appeal, the debtors relied upon § 38-10-4 to claim all property owned by them as exempt from the bankruptcy estate.

The trustee asks us to review the bankruptcy court's determination that West Virginia Code § 38-10-4 does not violate the Supremacy Clause. Because

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[1] It is not clear whether the exemptions in § 38-10-4 are intended to supercede or supplement West Virginia's general exemptions in bankruptcy proceedings; however, that issue is not before us today.

that determination is a question of law, we review the bankruptcy court's decision de novo.

III.

The trustee objects to the debtors' claims of exemption pursuant to West Virginia Code § 38-10-4, arguing that state exemption laws that apply only in bankruptcy cases are inconsistent with the Bankruptcy Code's objectives regarding the distribution of bankruptcy estate assets and are, therefore, rendered invalid by the Supremacy Clause.[2] We disagree.

The Supremacy Clause and the doctrine of preemption invalidate state statutes to the extent they are inconsistent with or contrary to the purposes or objectives of federal law. *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597, 604 (1991). There are three ways federal law may preempt state

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[2] The constitutionality of bankruptcy-specific exemption statutes has been the subject of much debate. The courts addressing the issue have split, although not all have addressed the precise issue presented here (*i.e.* whether the Supremacy Clause renders such statutes invalid). *See Kulp v. Zeman*, 949 F.2d 1106 (10th Cir. 1991); *In re Brown*, No. 06-30199, 2007 WL 2120380 (Bankr. N.D.N.Y. July 23, 2007); *In re Shumaker*, 124 B.R. 820 (Bankr. D. Mont. 1991); *In re Vasko*, 6 B.R. 317 (Bankr. N.D. Ohio 1980) (all holding bankruptcy-only exemption schemes valid). *But see In re Kanter*, 505 F.2d 228 (9th Cir. 1974); *In re Regevig*, 389 B.R. 736 (Bankr. D. Ariz. 2008); *In re Wallace*, 347 B.R. 626 (Bankr. W.D. Mich. 2006); *In re Mata*, 115 B.R. 288 (Bankr. D. Colo. 1990); *In re Lennen*, 71 B.R. 80 (Bankr. N.D. Cal. 1987); *In re Reynolds*, 24 B.R. 344 (Bankr. S.D. Ohio 1982); *In re Cross*, 255 B.R. 25 (N.D. Ind. 2000) (all holding bankruptcy-only exemption schemes invalid).

law. First, federal legislation may preempt state law by expressly declaring Congress' intent to do so. *Cox v. Shalala*, 112 F.3d 151, 154 (4th Cir. 1997). Second, Congress can "'occupy the field' by regulating so pervasively that there is no room left for the states to supplement federal law." *Id.* Third, a state law is pre-empted "to the extent that it actually conflicts with federal law." *Id.* There can be no preemption, however, where Congress "expressly and concurrently authorizes" state legislation on the subject. *Rhodes v. Stewart*, 705 F.2d 159, 163 (6th Cir. 1983). "In such instance, rather than preempting the area, Congress expressly authorizes the states to 'preempt' the *federal* legislation." *Id.*

Section 522(b)(1) affords the states the authority to restrict their respective residents to exemptions promulgated by the state legislatures, if they so choose. This statutory provision is an express delegation to the states of the power to create state exemptions in lieu of the federal bankruptcy exemption scheme. *See Hovis v. Wright*, 751 F.2d 714, 716 (4th Cir. 1985) (concluding that § 522(b)(1) grants the states broad power to craft state exemption laws applicable to bankruptcy proceedings). Congress has not seen fit to restrict the authority delegated to the states by requiring that state exemptions apply equally to bankruptcy and non-bankruptcy cases, and we are without authority to impose such a requirement.

The bankruptcy court's decision overruling the trustee's objection to the exemptions claimed by the debtors pursuant to West Virginia Code § 38-10-4 is

AFFIRMED.

[ENTERED: July 24, 2009]

FILED: July 24, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2202 (L)
(5:08-bk-00287)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

GEORGE M. PEVEICH,

Debtor – Appellee

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2204
(5:08-bk-00433)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

JAMES HAROLD MELOTT, JR.; MARY MARGARET MELOTT,

Debtors – Appellees

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2205
(5:08-bk-00454)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

SCOTT LEMOYNE JACKSON,

Debtor – Appellee

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2206
(5:08-bk-00464)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

NANCY LOUISE SCHUBERT, a/k/a Nancy Louise Meyers,

Debtor – Appellee

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2207
(5:08-bk-00510)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

CANDACE A. CURTIS, a/k/a Candace A. Baker,

Debtor – Appellee

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2208
(5:08-bk-00518)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

CHARLES MICHAEL BAIRD; SHIRLEY JEAN BAIRD,

Debtors – Appellees

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2209
(5:08-bk-00519)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

DANNY G. MORRELL, JR.; RAQUEL L. MORRELL,

Debtors – Appellees

STATE OF WEST VIRGINIA,

Intervenor – Appellee

No. 08-2210
(5:08-bk-00569)

MARTIN PATRICK SHEEHAN,

Trustee – Appellant

v.

CHARLES L. BROWN, JR.; NANCY J. BROWN,

Debtors – Appellees

STATE OF WEST VIRGINIA,

Intervenor – Appellee

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

[ENTERED August 14, 2008]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE	)	
	)	
DANNY G. MORRELL, JR., and RAQUEL L. MORRELL	)	Case No. 08-519
	)	
	)	
Debtors.	)	Chapter 7

MEMORANDUM OPINION

As authorized by Congress, West Virginia chose not to allow its residents to use the federal bankruptcy exemptions in 11 U.S.C. § 522(d). Instead, West Virginia has created its own scheme of bankruptcy exemptions in W. Va. Code § 38-10-4, which are different from the exemptions available to residents who are not in bankruptcy.

Martin P. Sheehan, the Chapter 7 trustee (the "Trustee") for Danny and Raquel Morrell (the "Debtors"), objects to the Debtors' claim of exemptions under § 38-10-4 on the grounds that West Virginia's bankruptcy only exemption scheme violates the Supremacy Clause of the United States Constitution.[1] For the reasons stated

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[1] The Trustee has not made any constitutional challenge to West Virginia's bankruptcy only exemption statute on grounds of uniformity, equal protection, improper delegation, or privileges and immunities. Likewise, the Trustee does not challenge the constitutionality of § 522(b)'s opt-out provision.

herein, the court will overrule the Trustee's objection.[2]

I. BACKGROUND

The Debtors value their principal residence at $56,000, and it is subject to a deed of trust securing a note in the approximate amount of $38,000. On Schedule C, the Debtors claim an $18,000 exemption in the property pursuant to W. Va. Code § 38-10-4(a), which allows each Debtor to exempt up to $25,000 in real property that the Debtor uses as a residence. The Trustee argues that the Debtors should be limited to the non-bankruptcy state law homestead exemption in § 38-9-1, which would allow each debtor to claim $5,000 in equity as exempt from their creditors.

If the Debtors are allowed to use West Virginia's bankruptcy only exemption for their residence, then the Trustee will abandon their home and declare that no assets exist to administer in their case. If the Trustee is successful, then the Trustee may elect to sell the Debtors' home and distribute any non-exempt proceeds to the Debtors' pre-petition creditors.

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[2] The Trustee objected to the claim of exemptions in 23 separate cases. Pursuant to a case management order, this case was designated as the lead case and all affected parties were allowed to brief the issue. The court's decision here is applicable in all 23 cases, and consistent with this Memorandum Opinion, separate orders will be entered in the individual cases overruling the Trustee's objection.

II. DISCUSSION

The Trustee argues that West Virginia has created a bankruptcy law that conflicts with the federal Bankruptcy Code by creating a scheme of exemptions only available to debtors that have filed a bankruptcy petition. According to the Trustee, Congress has already enacted bankruptcy only exemptions, which are those listed in 11 U.S.C. § 522(d). In the Trustee's view, West Virginia's choice to opt out of the federal exemption scheme is permissible, but creating bankruptcy only exemptions that are different from the exemptions allowed debtors in State court is impermissible.

The Debtors, and the West Virginia Attorney General, contend that West Virginia's bankruptcy only exemptions are authorized by Congress, and, therefore, cannot conflict with federal law. Moreover, they argue, no Supremacy Clause violation has occurred on the basis that West Virginia's bankruptcy only exemptions do not frustrate any federal bankruptcy policy.

To resolve the issue of whether W. Va. Code § 38-10-4 is preempted by the Bankruptcy Code, the court will examine: (A) the extent of concurrent federal and State authority to pass bankruptcy laws and the effect of federal supremacy; (B) the scheme of federal bankruptcy exemptions; (C) the scheme of West Virginia's bankruptcy and non-bankruptcy exemptions; and (D) whether West Virginia's bankruptcy only exemption scheme conflicts with the Bankruptcy Code so as to be preempted under the Supremacy Clause of the United States Constitution.

A. Concurrent Authority & the Supremacy Clause

Article I, Section 8 of the United States Constitution provides that "Congress shall have the Power . . . To establish . . . uniform Laws on the subject of Bankruptcies throughout the United States . . . ." As explained by the Supreme Court, this power is not exclusive to Congress; individual States also have the power to pass bankruptcy laws:

> [I]t must be recollected that, previous to the formation of the new constitution, we were divided into independent States, united for some purposes, but, in most respects, sovereign. These States could exercise almost every legislative power, and, among others, that of passing bankrupt laws. When the American people created a national legislature, with certain enumerated powers, it was neither necessary nor proper to define the powers retained by the States. These powers proceed, not from the people of America, but from the people of the several States; and remain, after the adoption of the constitution, what they were before, except so far as they may be abridged by that instrument.

Sturges v. Crowninshield, 17 U.S. (4 Wheat.) 122, 192-93 (1819).

Thus, "until the power to pass uniform laws on the subject of bankruptcies be exercised by

Congress, the States are not forbidden to pass a bankrupt law . . . ." *Id.* at 196. When Congress does pass a bankruptcy law, however, State laws on the same subject are "suspended." *Id.* Of course, a law enacted by Congress is "the supreme Law of the Land, . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2; *see also International Shoe v. Pinkus*, 278 U.S. 261, 265 (1929) (holding that "intolerable inconsistencies and confusion would result" if an Arkansas insolvency law was given effect while the National Bankruptcy Act was in force); *Gibbons v. Odgen*, 22 U.S. (9 Wheat.) 1, 211 (1824). ("[A]cts of the State Legislatures . . . [which] interfere with, or are contrary to the laws of Congress, made in pursuance of the constitution," are invalid under the Supremacy Clause). Only those State laws "which conflict with the bankruptcy laws of Congress . . . are suspended; those which are in aid of the Bankruptcy Act can stand."[3] *Stellwagen v. Clum*, 245 U.S. 605, 615 (1918). Indeed, as stated in *Stellwagen*, "Congress may recognize the laws of

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[3] Notwithstanding the clear statement by the Supreme Court in *Sturges* that States have the independent, inherent power to pass bankruptcy laws, the Court of Appeals for the Sixth Circuit has disagreed, calling the decision in *Sturges* one of "administrative necessity" that is contrary to the Constitution. *In re Hood*, 319 F.3d 755, 764-65 (6th Cir. 2003), *aff'd on different grounds*, 541 U.S. 440 (2004). Regardless of the merits of the Sixth Circuit's position on whether States retained bankruptcy power at the time of the Convention, the Supreme Court in *Sturges* plainly stated that the States did retain that power. Quite simply, *Sturges* is "binding precedent until [the Supreme Court] see fit to reconsider [it], regardless of whether subsequent cases have raised doubts about [its] continuing vitality." *Hohn v. United States*, 524 U.S. 236, 253 (1998).

State in certain particulars . . . . For example, the Bankruptcy Act recognizes and enforces the laws of the Sates affecting dower, exemptions, the validity of mortgages, priorities of payment and the like. Such recognition in the application of state laws does not affect the constitutionality of the Bankruptcy Act. . ." *Id.* at 613.

Accordingly, in the absence of any federal law on the same subject, a State is free to pass its own bankruptcy laws. Thus, West Virginia has the authority to enact a bankruptcy only statute; the issue is whether West Virginia's bankruptcy only exemption statute conflicts with the Bankruptcy Code.

Determining whether a State's statute is in conflict with a federal bankruptcy law, and thus is invalid under the Supremacy Clause of the United States Constitution is essentially a two step process. *Perez v. Campbell*, 402 U.S. 637, 644 (1971). The court must ascertain "the construction of the two statutes and then determin[e] the constitutional question whether they are in conflict. *Id.*

B. The Federal Bankruptcy Exemption Scheme

Federal bankruptcy law serves two essential purposes. First, as often stated, the purpose of bankruptcy is to give debtors "a new opportunity in life and a clear field for future effort, unhampered by the pressure and discouragement of preexisting debt." *Local Loan Co. v. Hunt*, 292 U.S. 234, 244 (1934). Second, "[b]ankruptcy law, at its core, is debt-collection law." Thomas H. Jackson, *The Logic*

and Limits of Bankruptcy Law, p.3 (Harvard University Press,1986), *reprinted by* Beard Books (2001); *see also Young v. Higbee Co.*, 324 U.S. 204, 210 (1945) ("[H]istorically, one of the prime purposes of the bankruptcy law has been to bring about a ratable distribution among creditors of a bankrupt's assets; to protect the creditors from one another."). Balancing a debtor's right to a fresh start against the rights of the debtor's creditors to collect on pre-petition debts is endemic to bankruptcy law. This tension is perhaps best witnessed in 11 U.S.C. § 522, which helps determine what assets are available for the payment of the debtor's creditors, and what assets a debtor will be able to shield from those creditors to effectuate the debtor's financial fresh start.

In making this determination, all of a Chapter 7 debtor's legal and equitable interests in property become property of the debtor's bankruptcy estate on the filing of the bankruptcy petition. 11 U.S.C. § 541(a)(1). That property is then subject to administration for the benefit of the debtor's creditors by the debtor's Chapter 7 trustee. § 704(a)(1). To ensure the debtor's fresh start, however, § 522(b) of the Bankruptcy Code allows a debtor to exempt certain property from being property of the estate, and, thus, excludes that property from administration by the trustee. 11 U.S.C. § 522(b)(1). Sometimes the property exemption is based on value, and sometimes the exemption consists of the property itself, regardless of its value. *E.g.*, § 522(d)(1), (9) (allowing up to $20,200 in equity to be exempted in a homestead, but allowing any home health aid to be exempted regardless of value).

To determine what exemptions are available to a debtor in bankruptcy, Congress allows a debtor to make one of two choices regarding the applicable exemption scheme. The first choice is in § 522(b)(2), which allows debtors to choose from the federal list of exemptions listed in paragraph (d) – unless the debtors' state of residence elects to foreclose that option. The second choice is in § 522(b)(3), which allows debtor to choose from the federal exemptions other than those listed in paragraph (d), and any property that is exempt under State or local law. In the event that a State has opted out of the federal exemptions listed in § 522(d), then the debtor may only use the exemptions listed in § 522(b)(3). Congress's stated reason for allowing States this option is set forth in the 1978 Act's legislative history:

> Under current law, what property is exempt is determined under State law. However, some State exemption laws have not been revised in this century. Most are outmoded, designed from more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start for more urban debtors. . . .
>
> Though exemption laws have been considered within the province of State law under the current Bankruptcy Act, H.R. 8200 adopts the position that there is a Federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin a fresh start. Recognizing, however, the circumstances do vary in different parts

> of the country, the bill permits the States to set exemption levels appropriate to the locale, and allows debtors to choose between the State exemptions and the Federal exemptions provided in the bill. Thus, the bill continues to recognize the States' interest in regulating credit within the State, but enunciates a bankruptcy policy favoring a fresh start.

Report of the Committee on the Judiciary, House of Representatives, To Accompany H.R. 8200, H.R. Rep. No. 95-595, Ch. 3, § II, p. 126, 95th Cong., 1st Sess. (1977).

Section 522(b)'s opt out provision is described as "[a]n eleventh hour compromise between congressional proponents and opponents . . . ." James B. Haines, Jr., *Section 522's Opt-Out Clause: Debtor's Bankruptcy Exemptions in a Sorry State*, 1983 Ariz St. L. J. 1, 4 (1983). The compromise was necessary because the House adopted a version of § 522 that established uniform federal exemptions that a debtor could choose in lieu of available state exemptions. *Id.* at 8. The Senate, however, proposed a version "relegating all debtors to state law exemptions with no minimum (or maximum) federal exemption provision." *Id.* Because the opt-out provision was negotiated at the eleventh hour, the available legislative history behind the compromise is "scant." *Id.* Congress never defined the scope of a State's power in opting out of the federal exemptions, and no indication exists that Congress ever considered whether an opt-out State had the power to enact bankruptcy-only exemptions. Joseph

Lamport, *The Preemption of Bankruptcy-Only Exemptions*, 6 Cardozo L. Rev. 583, 598-99 (1984).

Accordingly, § 522(b) is the product of two sets of competing policies. First, it seeks to strike a balance between a debtor's need for a fresh start and a creditor's need for payment. Second, it seeks to balance federal and state relations appropriately by establishing a federal exemption scheme aimed at supporting the fresh start/creditor payment balance, but, at the same time, it allows States to opt out of that scheme and substitute each State's own exemption laws so that the competing fresh start and creditor payment policies can be tailored to the needs of each State.

C. West Virginia's Exemption Scheme

West Virginia has two sets of exemptions. One for debtors in bankruptcy, and one for those who are not in bankruptcy. The difference in the exemption schemes can be stark. For example, W. Va. Code § 38-10-4(a), allows a single debtor to exempt up to $25,000 in real property that the debtor uses as a residence. In contrast, outside of bankruptcy, a single debtor is limited to a $5,000 homestead exemption under § 38-9-1.[4]

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[4] Other differences are more minor. *Cf.* W. Va. Code § 38-8-1(1) (allowing a nonbankrupt debtor to claim up to a $5,000 exemption in one motor vehicle, so long as the total personal property exemptions do not exceed $15,000), *with* § 38-10-4(b) (allowing a bankrupt debtor to exempt $2,400 in one motor vehicle, plus any unused amount of the $25,000 homestead exemption). *See, e.g.*, Julia A. Chincheck, *The Effects of West Virginia's Bankruptcy Exemption Statute on Resident Debtors*, 86 W. Va. L. Rev. 227, 245-47 (1983) (explaining the differences in the two exemption schemes).

The West Virginia bankruptcy exemption statute was enacted in 1981 in response to Congress's invitation to the States in the 1978 Bankruptcy Code to opt out of the federal bankruptcy exemptions listed in 11 U.S.C. § 522(d). Unfortunately, very little documentation of the legislative process leading to the enactment of W. Va. Code § 38-10-4 exists. The legislative history consists of Journal notes from the House of Delegates that reflect the bill (Com. Sub. For H.B. 849) being read three times before its passage, and then a further agreement by the House of Delegates to incorporate minor amendments made by the Senate before it was presented to the Governor for signature. No detailed committee or conference committee reports were created. While committee hearings and floor debates are audio taped, no such tapes currently exist regarding the enactment of W. Va. Code § 38-10-4 in 1981. In short, after examining § 38-10-4's legislative history, no explicit indication exists as to why West Virginia chose to enact bankruptcy only exemptions rather than afford debtors in bankruptcy the same exemptions used by non-bankruptcy debtors in State court.

The absence of explicit legislative statements regarding the creation of West Virginia's bankruptcy only exemption statute, however, does not mean that the purpose of the enactment cannot be pieced together. Congress had already articulated a federal interest in seeing that a debtor that goes through bankruptcy comes out with adequate possessions to begin a fresh start. Also, the stated purpose of allowing States to opt out of the federal exemptions in § 522(d) was that circumstances vary in different parts of the country, and the individual States are

best suited to set the exemption levels that are appropriate to the locale.

Apparently, the West Virginia legislature did not believe that its non-bankruptcy exemption scheme was adequate to fulfill the fresh start objectives of federal bankruptcy law. Indeed, the object of West Virginia's non-bankruptcy exemption laws is "for the protection and benefit of a poor debtor and his helpless family, to give them the bread of life and a pillow whereon to lay the head, to save them from destruction and absolute want." *State ex rel. Burt v. Allen*, 48 W. Va. 154, 162-63, 35 S.E. 990, 993 (1900). Thus, the goal of West Virginia's non-bankruptcy exemption laws is to prevent destitution. In contrast, bankruptcy exemptions aim to do more than prevent impoverishment. Bankruptcy exemptions serve to set aside enough property for the debtor to enjoy "a new opportunity in life and a clear field for future effort. . . ." *Hunt*, 292 U.S. at 244. At the same time, West Virginia apparently did not believe that the federal exemptions listed in 11 U.S.C. § 522(d) were best suited to strike the fresh start/creditor payment balance for its residents. W. Va. Code § 38-10-4 ("[T]his state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d).").

More specifically, a review of W. Va. Code § 38-10-4 and 11 U.S.C. § 522(d), as they existed in 1981, reveals only two differences. First the term "aggregate" in §522(d), as used in several places to describe the "debtor's interest" does not appear in original § 38-10-4. Second, § 522(d)(3) provided that

an unlimited amount of household goods could be exempted, but no particular item of household goods could be worth more than $200.00. In contrast, § 38-10-4(c) only permitted a total of $1000.00 of household goods to be exempted while keeping the limitation of $200.00 for a single item. Thus, it can be safely said that West Virginia originally elected to opt out of the federal exemptions because it wanted to put a cap on the amount of household goods that could be exempted by West Virginians filing bankruptcy. Since that time, however, West Virginia has added additional exemptions, and, as applicable here, increased a single debtor's homestead exemption to $25,000, which is in excess of the $20,200 currently allowed under § 522(d).

Accordingly, it is most likely that West Virginia chose to create bankruptcy only exemptions because it desired – as directed by § 522(b)'s legislative history – to tailor its bankruptcy exemption laws to a level that is appropriate for the residents of West Virginia to achieve the fresh start objectives of the Bankruptcy Code. *See* Julia A. Chincheck, *The Effects of West Virginia's Bankruptcy Exemption Statute on Resident Debtors*, 86 W. Va. L. Rev. 227, 248 (1983) ("[T]he West Virginia Legislature appears to have created a classification which is not 'wholly irrelevant' to the objective of providing a 'fresh start.'").

D. Preemption

With an understanding of the federal and West Virginia exemption schemes, the next step is to determine if the West Virginia exemption scheme

conflicts with federal bankruptcy law and is therefore preempted.

Federal preemption is generally stated to entail three inquiries. As stated by the Court in *Pennsylvania v. Nelson*, 350 U.S. 497, 502 (1956), the first inquiry is whether "'the scheme of federal regulation [is] so pervasive as to make reasonable inference that Congress left no room for the States to supplement it.'" The second is whether the statute "'touches a field in which the federal interest is so dominant that the federal system [must] be assumed to preclude enforcement of state laws on the same subject.'" *Id.* at 504. Third, the court must determine whether the enforcement of a state statute "presents a serious danger of conflict with the administration of the federal program." *Id.* at 505. In considering the validity of state laws touching the same subject as the federal law, the court "has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *see also Nat'l City Bank v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006) ("Preemption 'is compelled whether Congress' command is explicitly stated in the statute's language or implicitly contained in its structure and purpose.'") (citation omitted), *cert. denied*, 127 S. Ct. 2096 (2007). In sum, "States may not pass or enforce laws to interfere with or complement the Bankruptcy Act, or to provide additional or auxiliary regulations." *Pinkus*, 278 U.S. at 265-66. At the same time, those State laws "which are in aid of the Bankruptcy Act can stand." *Stellwagen*, 245 U.S. at 615.

In this case, the first and second inquiries are inapplicable for the reason that Congress expressly chose to allow a State to refuse the application of the federal bankruptcy exemptions listed in 11 U.S.C. § 522(d), and in lieu thereof, use the exemptions provided by State and local law. *E.g.*, *Kulp v. Zeman (In re Kulp)*, 949 F.2d 1106, 1109 n.3 (10th Cir. 1991) ("[W]e have no conflict because 11 U.S.C. § 522 expressly delegates to States the power to create bankruptcy exemptions."); *Rhodes v. Stewart*, 705 F.2d 159 (6th Cir. 1983) ("It is . . . axiomatic that Congress has not preempted an area wherein it has legislated when it expressly and concurrently authorizes the state legislature to disregard or opt-out of such federal legislative area."). Thus, West Virginia's bankruptcy only exemption law may only be preempted by federal law if it has exceeded the boundaries of the opt out provision, and thereby presents a serious danger of conflict with the Bankruptcy Code.

In passing on whether a State statue is permissible under the federal Constitution, "every reasonable presumption must be indulged in favor of the validity of such enactment." *Sweet v. Rechel*, 159 U.S. 380, 392-93 (1895). A state statute "must be regarded as valid, unless it can be clearly shown to be in conflict with the constitution." *Id.* at 393; *see also Oakland Club v. South Carolina Public Service Authority*, 110 F.2d 84, 88 (4th Cir. 1940) ("Ordinarily there is a strong presumption in favor of the constitutionality of the legislative enactment. . . And a finding [of invalidity] is indicated only in a very clear case. Every reasonable intendment is presumed against such a course of action."). Because this case involves an objection to an exemption filed

by the Chapter 7 trustee, the burden to prove the objection rests with the trustee. Fed. R. Bankr. P. 4003(c).

In addressing whether bankruptcy only State law exemptions schemes are constitutional, the available authority is split.[5] This court, however,

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[5] Some courts have held bankruptcy only exemptions unconstitutional. *E.g.*, *In re Regevig*, No. 08-2547, 2008 Bankr. LEXIS 1930 at *11 (Bankr. D. Ariz. June 24, 2008) ("There other than that provided by the Code, *i.e.*, not opting out of the Bankruptcy Code's exemptions."); *In re Wallace*, 347 B.R. 626, 635 (Bankr. W.D. Mich. 2006) ("What Congress cannot do under the Constitution is to delegate to . . . the states . . . the power to actually decide what is to be the appropriate [bankruptcy only exemption] scheme."); *In re Cross*, 255 B.R. 25, 35 (Bankr. N.D. Ind. 2000) ("[S]tates may not create exemptions that apply only to bankruptcy proceedings. Doing so frustrates the full operation of federal law by challenging the balance Congress struck which allocates the consequences of bankruptcy between debtors and creditors."); *In re Mata*, 115 B.R. 288, 291 (Bankr. D. Colo. 1990) ("While it is constitutionally permissible for Congress to permit state exemptions to apply in bankruptcy, it is not permissible for states to seek to enact two different levels of exemptions, one applicable in bankruptcy and one without."); *In re Lennen*, 71 B.R. 80, 83 (Bankr. N.D. Cal. 1987) ("[T]he statutory wording of section 522(b)(2)(A) that the debtor may claim property as exempt under 'State or local law that is applicable' should not, in view of constitutional considerations, be interpreted so liberally as to authorize a state exemption scheme which is applicable only in federal bankruptcy court."); *In re Reynolds*, 24 B.R. 344, (Bankr. S.D. Ohio 1982) ("When a state endeavors to adopt exemptions applicable only in the bankruptcy court, it then invades an area of law reserved to the federal government, as preempted by the United States Constitution and statutes enacted pursuant thereto. . . . [States] cannot . . . adopt provisions peculiar to and applicable only under federal bankruptcy law."); *see also In re Kanter*, 505 F.2d 228 (9th Cir. 1974) (holding a California statute unconstitutional that would

prohibit a trustee in bankruptcy from acquiring an interest in a debtor's personal injury action while judgment creditors could obtain a lien on the cause of action outside of bankruptcy); Joseph Lamport, Note, *The Preemption of Bankruptcy-Only Exemptions*, 6 Cardozo L. Rev. 583, 586 (1984-85) ("[T]he federal government has occupied the field of bankruptcy legislation and, therefore, state-enacted bankruptcy-only exemptions are preempted even though they may not be in actual conflict with specific provisions of the Bankruptcy Code.")

Other courts have held that bankruptcy only exemptions are constitutionally acceptable. *E.g.*, *Kulp v. Zeman (In re Kulp)*, 949 F.2d 1106, 1109 n.3 (10th Cir. 1991) ("[S]tates may pass laws which do not conflict with the federal scheme. In this case we have no conflict [with Colorado's bankruptcy only exemption] because 11 U.S.C. § 522 expressly delegates to states the power to create bankruptcy exemptions."); *In re Brown*, No. 06-30199, 2007 Bankr. LEXIS 2486 at *46 (Bankr. N.D.N.Y. July 23, 2007) (holding that Congress specifically allowed States to use their own exemptions instead of the federal exemptions listed in § 522(d), and New York's bankruptcy only exemption scheme is not so inconsistent with the exemptions listed in § 522(d) as to render it invalid under the Supremacy Clause); *In re Shumaker*, 124 B.R. 820, 826 (Bankr. D. Mont. 1991) ("[T[he underlying premise of *Mata* and *Lennen* that it is not permissible for states to seek to enact two different levels of exemptions, one applicable in bankruptcy and one without, simply misstates the applicable constitutional power of a state to enact bankruptcy laws where Congress has not sought to act."); *In re Vasko*, 6 B.R. 317, 323-24 (Bankr. N.D. Ohio 1980) (concluding that the State's bankruptcy only exemption law did not conflict with, or frustrate the basic objectives of Congress to provide a debtor with a fresh start and was therefore not preempted); William J. Woodward, *Exemptions, Opting Out, and Bankruptcy Reform*, 43 Ohio St. L. J.335, 363-64 (1982) (stating that "it is difficult to assess definitively congressional intent" on whether "the states are without authority to do anything other than opt out," but "[a]vailable evidence suggest...that the Code includes at least limited authority to develop exemptions specifically for state debtors in bankruptcy.")

believes that West Virginia's bankruptcy only exemption statute is not preempted by the Bankruptcy Code on four grounds: (1) West Virginia has the inherent power to enact bankruptcy laws; (2) the enactment of a bankruptcy only exemption statute is not precluded by § 522(b)'s opt out provision; rather, a bankruptcy only exemption statute is perhaps the best method of harmonizing existing state exemption laws with the fresh start objectives of bankruptcy; (3) while States are prohibited from allocating the consequences of bankruptcy between a debtor and a creditor, exemption laws are unique in that Congress has specifically recognized the non-preemption of a State's exemption statutes; and (4) the limits of West Virginia's bankruptcy only exemptions do not frustrate any Congressional policy for allowing exemptions in bankruptcy.

1. Inherent Power to Pass Bankruptcy Laws

One of the reasons some courts have determined that a bankruptcy only exemption law is unconstitutional is that "the authority to enact bankruptcy laws is only one of two powers granted to Congress under the Constitution whereby Congress is directed by the States to enact uniform laws." *In re Wallace*, 347 B.R. 626, 631 (Bankr. W.D. Mich. 2006). In the view of the *Wallace* court, "the Bankruptcy Clause is intended to encompass the entire 'subject of Bankruptcies,' including the subject of exemptions, and if . . . the grant of that power is exclusive, then Congress cannot . . . redelegate to the

States the authority to create such exemptions . . . ." *Id.* at 633.

As explained, supra, in Part (A), the Supreme Court of the United States has determined that States retain the power to pass bankruptcy laws and those laws are valid unless they conflict with a law of the United States. *Sturges*, 17 U.S. at 192-93. This court is bound by that decision, and, therefore, does not view West Virginia's enactment of a bankruptcy only exemption law as being an exercise of power delegated to it by Congress. West Virginia is legislating within its own sovereign authority with the acquiescence of Congress.

2. The Opt-Out Provision Encourages State Legislation

As reflected in the 1978 Act's legislative history, State law exemptions were generally regarded as being "outmoded, designed for more rural times, and hopelessly inadequate to serve the needs of and provide a fresh start to more urban debtors." *Report of the Committee on the Judiciary,* intent" on whether "the states are without authority to do anything other than opt out," but "[a]valiable evidence suggests . . . that the Code includes at least limited authority to develop exemptions specifically for state debtors in bankruptcy."). *House of Representatives, To Accompany H.R. 8200*, H.R. Rep. No. 95-595, Ch. 3, § II, p. 126, 95th Cong., 1st Sess. (1977). Likewise, the opt-out provision was designed to both "permit the States to set exemption levels appropriate to the locale, and . . . to recognize the States' interest in regulating credit within the

State," while, at the same time, "enunciat[ing] a bankruptcy policy favoring a fresh start." *Id.* West Virginia's non-bankruptcy homestead exemption, W. Va. Code § 38-9-1, may have been exactly the type of exemption law that Congress believed was outmoded and insufficient to afford a debtor a fresh start after bankruptcy. At its creation in 1864, it allowed a debtor to protect $1,000 of the debtor's homestead from creditors, by the time of its last amendment in 1974, that amount was only $5,000. Moreover, as stated *supra*, Part C, West Virginia's non-bankruptcy exemption laws are designed to prevent destitution, which is a different goal than providing a debtor with the fresh start that Congress desired to effectuate.

In fact, viewing the legislative history of 11 U.S.C. § 522(b)'s opt-out provision, a stronger case can be made for Congress's authorization for a State to create bankruptcy only exemptions than for Congress's purported attempt to constrict State law bankruptcy exemptions to those generally available to all residents of a State. The opt-out provision itself does not limit a State's authority to enact bankruptcy only exemptions, and bankruptcy only exemptions are consistent with ideals of federalism:

> Moreover, it appears that the opt-out compromise was perceived as a states' rights victory. Rather than allowing the source of bankruptcy exemptions to be changed to the federal government for the first time in recent history, the opt-out provision preserved for states the option of maintaining a measure of

> authority over that component of the bankruptcy process, as they had under the old Act. It seems more consistent with a states' rights purpose and with notions of federalism that Congress permitted states maximum flexibility to specify "State or local law" for purposes of bankruptcy independently of the exemption provisions otherwise applicable within their states.

William J. Woodward, *Exemptions, Opting Out, and Bankruptcy Reform*, 43 Ohio St. L.J. 335, 364 (1982).[6]

Indeed, the Bankruptcy Code provides that when a State opts out of the federal exemptions in 11 U.S.C. § 522(d), the exemptions available to a debtor are for property "that is exempt under Federal law, other than subsection (d) of this section, or *State or local law* that is applicable on the date of the filing of the petition." § 522(b)(3)(A) (emphasis added). Importantly, Congress defined exemptions with reference to "State of local law" – it did not use the well established term "applicable non-bankruptcy

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[6] *Contra*, *In re Regevig*, No. 08-2547, 2008 Bankr. LEXIS 1930 at *11 (Bankr. D. Ariz. June 24, 2008) ("Congress has pervasively defined the exemptions that a state may permit a debtor to claim only in a bankruptcy case, even if they are not generally exempt from creditors outside of bankruptcy . . . . Where Congress has already defined both the substantive law and procedure, in a pervasive federal scheme that generally pre-empts state legislation, Congress has occupied the field. There is simply no room for states to adopt their own bankruptcy-specific exemptions by a procedure other than that provided by the Code...").

law," which appears 32 times in the Bankruptcy Code. (Attorney General's Br., p. 16). Thus, by its plain language, § 522(b)(3) implicitly permits a State's bankruptcy law to be the "State or local law" by which an exemption can be claimed.

In sum, West Virginia appears to have admirably fulfilled its federal mandate in opting out of the federal exemptions in 11 U.S.C. § 522(d). It created a set of bankruptcy exemptions that, in the view of the Legislature: (1) are tailored to the needs of West Virginia residents, (2) appropriately regulate credit within the State, and (3) fulfill the fresh start objectives of the Bankruptcy Code by seeking to afford debtors in bankruptcy enough property to not only avoid destitution, but to gain "a new opportunity in life and a clear field for future effort . . . ." *Hunt*, 292 U.S. at 244.

3. Allocating the Consequences of Bankruptcy

In holding Indiana's bankruptcy only exemption statute unconstitutional, the court in the case of *In re Cross*, 255 B.R. 25, 36 (Bankr. N.D. Ind. 2000), held that Indiana's attempt to define what property a debtor may exempt in bankruptcy was an attempt to "control[] the distribution of assets between debtors and creditors and, thus, how the consequences of bankruptcy are allocated between them." *Id.* at 34. By creating a bankruptcy only exemption, Indiana frustrated "the full operation of federal law . . . ." *Id.* at 35. While Indiana's statute may have furthered the federal policy of affording a debtor in bankruptcy a fresh start, it frustrated the

other purpose of bankruptcy law, which is to repay creditors. *Id.* at 35-36. In *Cross's* view, a State's attempt to allocate the consequences of bankruptcy by setting bankruptcy exemption laws is just as evil as a State's attempt to control: (a) what debts are dischargeable, (b) the value of a bankruptcy discharge, (c) the manner in which the assets of the estate are distributed, and (d) attempting to prohibit the trustee from administering assets available to creditors outside of bankruptcy. *Id.* at 33.

In a similar vein, the Trustee contends that the legislative history of the 1978 Bankruptcy Code supports *Cross's* view that a State cannot create property rights based on the filing of a bankruptcy petition:

> Bankruptcy policy strongly favors equality of treatment of all creditors, and strongly disfavors the creation of property rights upon the filing of a bankruptcy case. The purpose of bankruptcy is to enforce rights that have arisen before bankruptcy, and to enforce them in an orderly liquidation process. Springing interests unfairly defeat legitimate expectations of other creditors who may have relied on the absence of any such prior interests in extending credit. Section 67 of the present Bankruptcy Act and section 545 of proposed title 11 of the United States Code implement this important bankruptcy policy.

Report of the Committee on the Judiciary, House of Representatives, To Accompany H.R. 8200, H.R. Rep. No. 95-595, 95th Cong., 1st Sess. (1977)

This court cannot agree with *Cross's* analysis, or the Trustee's assertion that the 1978 Bankruptcy Code's legislative history sought to prohibit a State from enacting a bankruptcy only exemption law. Importantly, a State's attempt to control what debts are dischargeable, the value of the bankruptcy discharge, the manner of distribution, and the extent of property of the bankruptcy estate all conflict with express provisions of the Bankruptcy Code. *See* 11 U.S.C. §§ 523(a), 524(a), 541, 726. Unlike § 522(b), Congress has not indicated any willingness to allow States to create the operable rules for these areas of bankruptcy law. Indeed, § 545 furthers the Congressional policy of prohibiting States from dictating the consequences of a federal bankruptcy proceeding by expressly allowing a trustee to avoid the fixing of a statutory lien on property of the debtor that is triggered by the filing of a bankruptcy petition.

The distinction between § 522(b)'s opt out provision and the mandatory nature of other Bankruptcy Code provisions that prohibit a State from controlling the consequences of a bankruptcy proceeding is an important one. And in this court's view, one that was not afforded is proper weight in *Cross's* analysis. A distinct difference exists between creating a bankruptcy only exemption law and attempting to control the course and scope of a federal bankruptcy proceeding. A State's bankruptcy only exemption law (to the extent that it is not too

inconsistent with federal bankruptcy objectives) is not the type of State law that results in unequal treatment of creditors, or a "springing interest" that defeats creditor expectations. Moreover, the legislative history cited by the Trustee concerns the avoidance of statutory liens under § 545, and the court is disinclined to use the legislative history of that section to interpret § 522(b), which already has its own legislative history.

In sum, by enacting its bankruptcy only exemption law, West Virginia is not seeking to allocate the consequences of bankruptcy; rather, it is, pursuant to its Congressional directive, setting aside that portion of the debtor's property, appropriate to the locale, sufficient enough to effectuate the debtor's fresh start, and to protect the local credit market. The effect that bankruptcy only exemptions laws have on other sections of the Bankruptcy Code is incidental and not constitutionally infirm.

4. Frustrating the Purpose of the Bankruptcy Code

Given the objectives of Congress in creating the opt-out provision of 11 U.S.C. § 522(b) – to provide the debtor with a fresh start and to regulate credit consonant with the needs of the locale – the court must determine if West Virginia's bankruptcy only exemption statute frustrates this purpose.

Of course, Congress chose to balance the fresh start needs of a debtor and the collection needs of the credit industry in § 522(d). West Virginia's

bankruptcy exemptions are different from those listed in that subsection. With regard to the use of a State's general, non-bankruptcy exemptions laws, the Bankruptcy Code "does not require those states that have opted out of the federal exemptions to provide exemptions comparable, concomitant, or corresponding to the federal exemptions." *Clark v. Chicago Mun. Emples. Credit Union*, 119 F.3d 540, 544 (7th Cir. 1997). Because Congress has already defined the scope of bankruptcy only exemptions in § 522(d), however, it is important that a State's bankruptcy only exemption law not frustrate the purposes and policies embodied in the federal determination of the appropriate balance between a debtor's right to a fresh start and a creditor's right to repayment. *See, e.g.*, Woodward, 43 Ohio St. L.J. at 368 ("[F]ormulating exemptions for bankruptcy purposes . . . must fit and operate with a much larger federal statute. . . . which has reasonably well defined goals and objectives set by Congress. . . . [A] state risks the undoing of its opt out legislation if that legislation is perceived as thwarting federal objectives.").

Here, West Virginia allows a single debtor to exempt up to $25,000 in equity in the debtor's homestead, and any unused portion of that amount can be used to exempt other property of the debtor. W. Va. Code § 38-10-4(a), (e). By comparison, the federal exemptions in 11 U.S.C. § 522(d) allow a single debtor to exempt $20,200 in equity in the debtor's homestead, and up to $10,125 of that amount can be used to exempt other property of the debtor. Likewise the federal motor vehicle exemption is currently $3,225, § 522(d)(2), and the West

Virginia motor vehicle exemption is $2,400. W. Va. Code § 38-10-4(b). The differences between the two statutes are not so great as to call into question whether West Virginia's bankruptcy exemptions frustrates a federal bankruptcy policy.[7] *Accord*, *In re Brown*, No. 06-30199, 2007 Bankr. LEXIS 2486 at * (Bankr. N.D.N.Y. July 23, 2007) (holding that the differences between New York's bankruptcy only exemption law and the federal exemptions listed in § 522(d) did "not appear to 'obstruct the basic objectives of federal law.'").

In sum, the court cannot find that West Virginia's bankruptcy only exemption law frustrates federal law, and, consequently, W. Va. Code § 38-10-4 is not preempted under the Supremacy Clause of the United States Constitution.

III. CONCLUSION

The court will deny the Trustee's objection to the Debtors' claim of exemptions. A separate order will be entered pursuant to Fed. R. Bankr. P. 9021.

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[7] A fuller examination of the federal and West Virginia exemption schemes, as they relate to the Trustee's filed objections in the 23 cases consolidate by the court for purpose of briefing the Trustee's objection, show only minor differences. Those differences are no cause of concern.

[ENTERED August 14, 2008]

IN THE UNITED STATES BANKRUPTCY COURT FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

IN RE:	)	
	)	
GEORGE M. PEVEICH,	)	Case No. 08-287
	)	
	)	
Debtor.	)	Chapter 7

ORDER

On August 14, 2008, this Court entered a Memorandum Opinion in the case of *In re Morrell*, Case No. 08-519. For the reasons stated in that Memorandum Opinion, it is

ORDERED that the Objection to Exemptions Claimed Pursuant to W. Va. Code § 38-10-4 on the Grounds that Said Statute is Unconstitutional, filed by the Debtor's Chapter 7 trustee on May 19, 2008 (Document No. 39), be and hereby is OVERRULED. It is

FURTHER ORDERED that the Objection of the Trustee to Exemptions Which May Become Moot by Decision on Constitutional Challenge to W. Va. Code § 38-10-4, filed by the Debtor's Chapter 7 trustee on June 12, 2008 (Document No. 64), be and hereby is OVERRULED.

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No. 09-481 (2)

Supreme Court, U.S.
FILED
NOV 20 2009
OFFICE OF THE CLERK

In The
Supreme Court of the United States

MARTIN PATRICK SHEEHAN,

Petitioner,

v.

SCOTT LEMOYNE JACKSON, *ET AL.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF THE STATE OF WEST VIRGINIA

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QUESTION PRESENTED

Should the exemptions established in West Virginia Code § 38-10-4 and which only apply in Bankruptcy Cases be held invalid under the Supremacy Clause of the United States Constitution, U.S. Const. art. VI, cl. 2, considering the grant of authority given to states by the Congress in 11 U.S.C. § 522(b).

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, the Respondent, The State of West Virginia, discloses that it is not a corporation. There is no parent corporations and no publicly held company that owns 10% or more of corporate stock.

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ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

A
The Petitioner's Statement Of The Issues And Constitutional Provisions At Issue Include Constitutional Provisions Not At Issue In The Courts Below

In his Petition for Writ of Certiorari the Petitioner raises the issue that the West Virginia Law in question, namely, West Virginia Code § 38-10-4, violates the Supremacy Clause, U.S. Const. art. VI, cl. 2, the Bankruptcy Uniformity Clause, U.S. Const. art. I, § 8, cl. 4, and the Contract Clause, U.S. Const. art. I, § 10, cl. 1, of the United States Constitution. At no time prior to the Petition for Writ of Certiorari did Petitioner make a Bankruptcy Uniformity Clause or Contract Clause argument.

On page three of his brief before the United States Court of Appeals for the Fourth Circuit the Petitioner set forth the following Statement of the Issues:

> Should the exemptions established in West Virginia Code § 38-10-4 and which only apply in bankruptcy cases be held invalid under the Supremacy Clause of the United States Constitution?

> If the answer to the above question is yes, should West Virginia Code § 38-10-4 be held totally invalid, or should the opt out language be severed and continue to be valid?

In his brief before the United States Bankruptcy Court for the Northern District of West Virginia, which appears at page 508 of the Joint Appendix filed with the United States Court of Appeals, the Petitioner defined the issues as follows:

> The trustee has filed a series of objections in the above captioned case in which he has challenged the constitutionality of W.Va. Code § 38-10-4. The trustee has focused his challenge to the constitutionality of the statute under the Supremacy Clause of the United States Constitution. This brief is designed to address the issues relevant to that challenge. The trustee perceives four topics to be worthy of analysis in this context. These are: 1) statutory interpretation of 11 U.S.C. § 522(b)(1); 2) the standard for evaluating challenges on Supremacy Clause grounds, particularly in bankruptcy proceedings; 3) whether the West Virginia statute being challenged falls under that test; and, 4) if the statute is unconstitutional, is it partially, or completely, invalid.

There is no reason for this Court to address Bankruptcy Uniformity Clause or Contract Clause issues until the United States Bankruptcy Court for the Northern District of West Virginia and the United States Court of Appeals for the Fourth Circuit are given the opportunity to address those issues in some other case. As a general rule, this Court does not address arguments not raised below. *Granfinanciera, S.A. v. Norberg*, 492 U.S. 33, 109 S. Ct. 2782 (1989).

B

There Is No Actual Split Of The Circuits, Or If So, The Split Is Shallow

The Fourth Circuit in its opinion below recognized some split as to the validity of bankruptcy only exemptions, but most don't address the precise issue. 574 F.3d 248 at p. 252, n. 2. Considering the cases reviewed at the Circuit Court level, it would be premature to accept this case. There are two cases that recently have been submitted to the Ninth Circuit Bankruptcy Appellate Panel for decision, *Morantz v. Torjesen*, 08-1266 and *Sticka v. Applebaum*, 09-1134, both of which concern California's bankruptcy only exemptions. If any of the Ninth Circuit BAP cases were appealed to the Ninth Circuit Court of Appeals, and it should reach a contrary decision to that rendered here, then perhaps those cases should be reviewed.

Currently, the Tenth Circuit has agreed with the Fourth Circuit. *Kulp v. Zeman*, 949 F.2d 1106 (10th Cir. 1991). The Ninth Circuit may or may not

agree with the Fourth Circuit. Previously, it had no choice but to strike down a California bankruptcy only exemption law, because the provision attempted to define property of the estate instead of what property may be exempt. *In re Kanter*, 505 F.2d 228 (9th Cir. 1974). Likewise other courts were forced to strike down bankruptcy only provisions, because those provisions, under the guise of exemption statutes, actually attempted to alter some other provision of the bankruptcy law. See for instance *In re Lee*, 22 B.R. 977 (Bankr. C.D. Cal. 1982), *In re Stacey*, 24 B.R. 97 (Bankr. S.D. Cal. 1982), and *In re Garrido*, 43 B.R. 289 (Bankr. C.D. Cal. 1984). Those cases do not conflict with the case at bar. Also cases such as *Matter of Reynolds*, 24 B.R. 344 (Bankr. S.D. Oh. 1982) are not on point because the bankruptcy only statute was found not to harm the Trustee or creditors. *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000) likewise is not on point as the Indiana exemption was controlled by another exemption statute, what is now 11 U.S.C. § 522(b)(3)(B), concerning the exemption for joint tenancies and tenancies by the entireties. The West Virginia statute is controlled by 11 U.S.C. § 522(b)(3)(A).

C

This Court Has Already Addressed This Issue

In *Owen v. Owen*, 500 U.S. 305, 111 S. Ct. 1833 (1991) this Court analyzed the criteria for bankruptcy exemptions in opt out states. Essentially this Court said that there was no criteria. "Nothing in subsection (b) (or elsewhere in the code) limits a state's power to restrict the scope of its exemptions; indeed it could theoretically accord

no exemptions at all." 500 U.S. at p. 308, 111 S. Ct. at p. 1835.

Where a state runs afoul of the commerce clause and the grant of authority given to it by the Congress in 11 U.S.C. § 522(b) is not when it sets its own bankruptcy exemptions. That is exactly what the Congress authorized states to do. Where a state runs afoul of its mandate is when, under the guise of setting its own bankruptcy exemptions, it is actually attempting to nullify or alter some other provision of the bankruptcy law or some other federal law.

This is what happened in *Owen v. Owen*. This Court prohibited Florida exemption law to be used as a vehicle to prevent a debtor from taking advantage of the judicial lien avoidance procedure provided by 11 U.S.C. § 522(f). As addressed by Respondent in Part B of Argument in this Brief, an attempt to nullify or alter another section of the bankruptcy law was at issue in several of the cases cited by the Petitioner in his argument for there being a split in the Circuits. This is clearly not the case with the West Virginia Statute.

As the Fourth Circuit said in its opinion below, the West Virginia bankruptcy exemptions as set forth in West Virginia Code § 38-10-4 "...establishes a number of exemptions modeled after (but different in certain respects from) those contained in the Bankruptcy Code." 574 F.3d at p. 251. In other words § 38-10-4 is meant to be a substitution for the exemptions in 11 U.S.C. § 522(d), and it makes no attempt to nullify or alter some other provision of the bankruptcy law or some

other federal law. Hence, it passes the test of *Owen v. Owen*, and the Fourth Circuit was correct when it said:

> Section 522(b)(1) affords the states the authority to restrict their respective residents to exemptions promulgated by the state legislatures, if they so choose. This statutory provision is an express delegation to the states of the power to create state exemptions in lieu of the federal bankruptcy exemption scheme. See *Hovis v. Wright*, 751 F.2d 714, 716 (4th Cir. 1985) (concluding that § 522(b)(1) grants the states broad power to craft state exemption laws applicable to bankruptcy proceedings). Congress has not seen fit to restrict the authority delegated to the states by requiring that state exemptions apply equally to bankruptcy and non-bankruptcy cases, and we are without authority to impose such a requirement. 574 F.3d at p. 252.

CONCLUSION

For the Foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully Submitted,

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Dated: November 20, 2009

No. 09-481

Supreme Court, U.S.
FILED
DEC 16 2009
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In The
Supreme Court of the United States

MARTIN PATRICK SHEEHAN, TRUSTEE,

Petitioner,

v.

SCOTT LEMOYNE JACKSON,
THE STATE OF WEST VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is 11 U.S.C. § 522(b)(1) a grant of authority to, and or congressional ratification of an independent power of, States to enact exemption schemes that only operate within the context of a bankruptcy proceeding?

2. Is the exemption scheme established in W.Va. Code § 38-10-4, a scheme of exemptions that can only apply in bankruptcy proceedings, preempted under the Supremacy Clause, Article VI of the Constitution, given that the power to establish "uniform laws on the subject of bankruptcies" was vested in the Congress under Article I, Section 8, clause 4, while the power to enact legislation impairing the obligation of contracts was prohibited to the States under Article I, Section 10?

LIST OF ALL PARTIES TO THE PROCEEDING

The original parties to this proceeding are all listed in the caption. Appearing as amicus curiae in support of petitioner are: Roger Schlossberg of Maryland, Morris L. Horowitz of New York, and Jill L. Ford of Arizona, each of whom are Chapter 7 panel trustees.

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CASE

In re: Pontius,
No. GK 08-04124,
(Bankr. W.D. Mich., December 22, 2009).....1

ARGUMENT

Since the submission of petition for writ of certiorari, United States Bankruptcy Court Judge James D. Gregg in the Western District of Michigan decided In re: Pontius, No. GK 08-04124 (Bankr. W. D. Mich., December 22, 2009). This case resolves the legal issues presented in the petition for a writ of certiorari favorably to the petitioner. The resolution is in conflict with the decision of the United States Court of Appeals for the Fourth Circuit in the instant case. This decision adds to the conflict between the courts that have addressed these issues. (While scheduled for publication, the opinion of Judge Gregg has not yet been published. A copy is included in the appendix for the convenience of the Court.)

CONCLUSION

WHEREFORE, the undersigned asks that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted.

Respectfully submitted,

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APPENDIX

UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF MICHIGAN

In re:

SHARON KAY PONTIUS, Case No. GK 08-04124
Chapter 7

Debtor.
_____/

OPINION REGARDING CONSTITUTIONALITY OF MICHIGAN BANKRUPTCY SPECIFIC EXEMPTIONS

Appearances:

R. Todd Redmond, Esq., Kalamazoo, Michigan, attorney for Sharon Kay Pontius, Debtor.

Thomas C. Richardson, Esq. and Nicholas J. Daly, Esq., Kalamazoo, Michigan, attorneys for Thomas R. Tibble, Chapter 7 Trustee.

I. FACTS AND PROCEDURAL BACKGROUND.

On May 8, 2008, Sharon Kay Pontius ("Debtor") filed a petition for relief under chapter 7 of the Bankruptcy Code.[1] In Schedule A, the Debtor lists among her assets a fee simple interest in a house and lot in Kalamazoo, Michigan (the "Property"). The Debtor values the Property at

---

[1] The Bankruptcy Code is contained in 11 U.S.C. §§ 101-1532. This case was filed after the effective date of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, commonly referred to as "BAPCPA."

$70,000 and alleges it is encumbered by a mortgage and a tax lien totaling $26,415. The Debtor is unmarried.

The Debtor seeks to exempt $31,900 of the value of the Property as her homestead. The Debtor relies upon Mich. Comp. Laws Ann. § 600.5451(1)(n),[2] which reads as follows:

> Sec. 5451(1) *A debtor in bankruptcy under the bankruptcy code,* 11 USC 101 to 1330, may exempt from property of the estate property that is exempt under federal law or, under 11 USC 522(b)(2), the following property ...
>
> (n) The interest of the debtor, the codebtor, if any, and the debtor's dependents, not to exceed $34,500 in value or, if the debtor or a dependent of the debtor at the time of the filing of the bankruptcy petition is 65 years of age or older or disabled, not to exceed $51,650 in value, in a homestead.

§ 600.5451(1)(n) (emphasis added).[3]

---

[2] Because this opinion principally addresses Michigan exemption provisions, all future references to Mich. Comp. Laws Ann. shall be to the specific statutory subsection, e.g., "§ 600.5451(1)." The reference in the Michigan statute to "11 USC 101 to 1330" is because it was passed prior to the BAPCPA amendments.

[3] The exemption amounts originally specified in § 600.5451(1)(n) when enacted in 2004 were $30,000 and $45,000 respectively but were increased to the current levels in 2008 pursuant to subsection 4 of Act No. 575 which requires changes in the exemption amounts every three years to reflect change in the consumer price index.

Thomas R. Tibble, the chapter 7 trustee ("Trustee"), objected to the Debtor's exemption on the basis that § 600.5451, as "bankruptcy specific" legislation, is unconstitutional in violation of the Supremacy Clause[4] because it impermissibly infringes on Congress' exclusive right to establish "uniform Laws on the subject of Bankruptcies throughout the United States." U.S. Const. art. I, § 8, cl. 4 (the "Bankruptcy Clause").

As required by Bankruptcy Rule 9005.1 and 28 U.S.C. § 2403, notice was given to the Michigan Attorney General of the Trustee's constitutional challenge to § 600.5451. The Attorney General did not respond, made no appearance at the hearing, and submitted no legal position.[5]

II. ISSUE.

The issue is straightforward. Is the "bankruptcy specific" exemption set forth in § 600.5451 unconstitutional or not?

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[4] ""This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2.

[5] Originally, this bankruptcy case had been combined with two other bankruptcy cases only for a joint hearing for the other debtors who had also claimed homestead exemptions under § 600.5451. The chapter 7 trustees' objections to those debtors' exemptions were resolved at, or immediately before, the joint hearing. The Michigan Attorney General likewise had been given notice of the constitutional challenge in the other cases but did not appear.

III. JURISDICTION.

The Trustee has timely objected to the exemption claimed by the Debtor. Fed. R. Bankr. P. 4003(b). The court has jurisdiction of this contested matter. 28 U.S.C. § 1334 and the Local Rule 83.2(a) (W.D. Mich.) (referring bankruptcy cases and related matters as authorized by 28 U.S.C. § 157(a)). The objection to the Debtor's exemption is a core proceeding. 28 U.S.C. § 157(b)(2)(A), (B) and (E). The Trustee has the burden of proving that the claimed exemption is improper. Fed. R. Bankr. P. 4003(c).

IV. DISCUSSION.

The route by which the Michigan Legislature concluded that it could enact exemptions which would apply *only* in a *federal* bankruptcy case is murky. In 2001, an Advisory Committee to the Civil Law and Judiciary Subcommittee of the House Civil and Judiciary Committee of the Michigan Legislature ("Advisory Committee")[6] was formed "to review and, if appropriate, provide recommendations to update the property exemption laws."?[7] The

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[6] The Advisory Committee was comprised of highly competent and very experienced commercial law attorneys from the western and eastern districts of Michigan. Advisory Committee members were: Steven L. Rayman, Esq., Thomas B. Radom, Esq., Paul F. Davidoff, Esq., Sandra S. Hamilton, Esq., James W. Boyd, Esq., Scott W. Dales, Esq., Rozanne M. Giunta, Esq., David W. Ruskin, Esq., Craig S. Schoenherr, Sr., Esq., Karen E. Evangelista, Esq., and Judy B. Calton, Esq.

[7] Letter dated August 11, 2003, to Michigan State Representative Alexander C. Lipsy (at whose request the Advisory Committee was formed) regarding submission of "Report and Recommendations Concerning Proposed Modifications to Michigan's Current Property Exemption Laws."

Advisory Committee labored for two years before issuing a Report and Recommendations to the Subcommittee ("Report and Recommendations"). The Report and Recommendations suggested many changes to the *general* Michigan exemption statute, § 600.6023, including an increase in the $3,500 Michigan homestead exemption to $30,000 ($45,000 if the debtor or a dependent of the debtor was over 65 or disabled). The Report and Recommendations did *not* recommend limitation of these new exemptions only to bankruptcy proceedings. *Report and Recommendations of the Advisory Committee to the Civil Law and Judiciary Subcommittee of the House Civil and Judiciary Committee Regarding Proposed Modifications to the Michigan Exemption Statutes, the Purpose and Policy of Michigan Exemption Laws* (August 11, 2003).

With few changes, the new exemptions suggested by the Report and Recommendations were adopted by the Michigan Legislature in 2004, to be effective on January 3, 2005, as § 600.5451. *However, the Legislature limited the application of the law only to proceedings involving "[a] debtor in bankruptcy under the Bankruptcy Code."* Applying the new statutory exemptions only to federal bankruptcy proceedings was without explanation in either the legislative history or the Advisory Committee records. Winnifred P. Boylan & Melanie R. Beyers, *The Trek of Michigan Exemptions in the Universe of Bankruptcy*, 33 Michigan Real Property Review 85, 85-92 (Summer 2006).

Although the legislative method by which the Michigan Legislature adopted its "bankruptcy specific" exemptions seems out of the ordinary, other states have also adopted exemptions intended to only apply in federal bankruptcy cases.[8] Not surprisingly, these state exemption laws have generated a spate of litigation concerning their constitutionality.

A number of courts have determined such "bankruptcy specific" exemption schemes to be unconstitutional as violating the Supremacy Clause, U.S. Const. art. VI, cl. 2, and infringing upon Congress' exclusive right to enact "uniform Laws on the subject of Bankruptcies." The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4; *see, e.g., In re Regevig*, 389 B.R. 736 (Bankr. D. Ariz. 2008) (invalidating California's "bankruptcy specific" exemptions); *In re Cross*, 255 B.R. 25 (Bankr. N.D. Ind. 2000) (determining unconstitutional Indiana's "bankruptcy specific" exemptions); *In re Mata*, 115 B.R. 288 (Bankr. D. Colo. 1990) (concluding that Colorado's "bankruptcy specific" exemptions were unconstitutional); *In re Reynolds*, 24 B.R. 344 (Bankr. S.D. Ohio 1982) (upholding a constitutional challenge to Ohio's "bankruptcy specific" exemptions); *see also Kanter v. Moneymaker (In re Kanter)*, 505 F.2d 228 (9th Cir. 1974) (holding unconstitutional a California statute that sought to prohibit a bankruptcy trustee from acquiring an interest in a debtor's personal injury action, while

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[8] These states include: California, Colorado, Georgia, Montana, New York, Ohio and West Virginia.

allowing judgment creditors to obtain a lien on the debtor's cause of action outside of bankruptcy).

One of the bankruptcy judges in this district, Judge Hughes, previously determined § 600.5451 to be unconstitutional. *In re Wallace*, 347 B.R. 626 (Bankr. W.D. Mich. 2006). A number of commentators also have questioned the constitutionality of such state "bankruptcy specific" legislation. *See, e.g.*, Joseph Lamport, Note, *The Preemption of Bankruptcy-Only Exemptions*, 6 Cardozo L. Rev. 583, 586 (1985); 4 *Collier on Bankruptcy* ¶ 522.02[4] (15th ed., rev. 2008); 3 *Norton Bankr. Law & Practice 3d* § 56:3 at n. 11 (2008).

To the contrary, a number of other courts have upheld the constitutionality of state "bankruptcy specific" exemption schemes. *See, e.g., In re Brown*, No. 06-30199, 2007 WL 2120380 (Bankr. N.D.N.Y. July 23, 2007) (upholding New York's "bankruptcy specific" exemptions), *aff'd*, No. 07-cv-0856, 2007 WL 4560671 (N.D.N.Y. Dec. 18, 2007); *In re Shumaker*, 124 B.R. 820 (Bankr. D. Mont. 1991) (upholding a Montana statute exempting Individual Retirement Accounts only for bankruptcy debtors); *In re Vasko*, 6 B.R. 317 (Bankr. N.D. Ohio 1980) (upholding Ohio's "bankruptcy specific" exemptions). Very recently, the Fourth Circuit Court of Appeals upheld West Virginia's "bankruptcy specific" exemptions. *Sheehan v. Peveich (In re Peveich)*, 574 F.3d 248 (4th Cir.

2009), *aff'g, In re Morrell*, 394 B.R. 405 (Bankr. N.D. W. Va. 2008).[9]

This court is certainly cognizant of the admonition that it should not decide a constitutional issue unless it is absolutely compelled to do so. "It is a fundamental rule of judicial restraint ... that this Court will not reach constitutional questions in advance of the necessity of deciding them." *Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering, P.C.*, 467 U.S. 138, 157, 104 S. Ct. 2267, 2279 (1984); *see also Spector Motor Service, Inc. v. McLaughlin*, 323 U.S. 101, 105, 65 S. Ct. 152,

[9] In the *Morrell* case, the bankruptcy court noted that in allowing a debtor to exempt property under "State or local law," Congress did not limit the breadth of those laws by the phrase "applicable non-bankruptcy law," which appears in several other places throughout the Bankruptcy Code. 11 U.S.C. § 522(b)(3). It then reasoned that "by its plain language, § 522(b)(3) implicitly permits a State's *bankruptcy* law to be the 'State or local law' by which an exemption can be claimed." *In re Morrell*, 394 B.R. at 416 (emphasis added). As explained below, such an interpretation places far too much emphasis on the absence of the phrase "applicable non-bankruptcy law."

Throughout the Bankruptcy Code, Congress has referred to "state or local law" without the phrase "non-bankruptcy" and, by doing so, has not implicitly "permitted states to pass their own bankruptcy laws on the subject." *See, e.g.*, 11 U.S.C. § 346(b) which requires a trustee to withhold amounts from the payment of wage claims "under applicable state or local tax law." Does this mean that a state or locality could promulgate a tax law applicable *only* to trustees in bankruptcy imposing a higher withholding level for bankruptcy claimants or more onerous withholding duties on trustees? Also, consider 11 U.S.C. § 506(b) which allows a secured creditor to collect "fees, costs, or charges provided for under ... State statute." Does this authorize a state to grant or deny to a secured creditor the right to collect such fees only in federal bankruptcy cases?

154 (1944); *Blair v. United States*, 250 U.S. 273, 279, 39 S. Ct. 468, 470 (1919); *Crook v. Baker*, 813 F.2d 88, 91 (6th Cir. 1987). This judge has previously determined it unnecessary to rule upon the constitutionality of § 600.5451. *In re Basch*, 341 B.R. 615 (Bankr. W.D. Mich. 2006) (because the debtor there had the ability to amend his entireties property exemption so as to exempt the same Michigan real property under a *non*-"bankruptcy specific" Michigan exemption statute). In contrast, in the exemption objection now raised by the Trustee, this court is unable to avoid the constitutional question. Unlike the situation in *Basch*, the Debtor is unmarried and cannot claim § 600.6023a, a general exemption, which applies only to entireties property. This court, therefore, must address the constitutionality of § 600.5451. For the reasons below, the court determines § 600.5451 to be unconstitutional on at least two grounds.[10]

A. *May Congress Constitutionally Delegate Its "Bankruptcy Power" to the States*?

The cases which uphold the constitutionality of state "bankruptcy specific" exemption schemes generally reason that Congress, in passing 11 U.S.C. § 522(b)(1), delegated to the states the authority to restrict their residents to state exemptions; therefore, 11 U.S.C. § 522(b)(1) is an "express delegation to the states of the power to create state exemptions in lieu of the federal bankruptcy exemption scheme." *Sheehan v. Peveich*, 574 F.3d

[10] There may be another reason that has not been raised by the Trustee and it will not be addressed by the court.

248, 252 (4th Cir. 2009).[11] However, such reasoning immediately raises another legal question. May Congress constitutionally delegate to a state legislature the power to enact a portion of a *federal law*, the Bankruptcy Code?

The Constitution grants Congress the power to "establish ... uniform Laws on the subject of Bankruptcies." The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. Court opinions which uphold state "bankruptcy specific" exemptions reason that, in enacting 11 U.S.C. § 522, Congress made an "express delegation" to the states to enact laws which operate *solely* in bankruptcy proceedings. The downfall of this "express delegation" rationale is that it is unconstitutional. The Supreme Court has consistently held that *Congress may not constitutionally delegate its legislative power.* "It does not admit of argument that [C]ongress can neither delegate its own powers, nor enlarge those of a state." *Wilkerson v. Rahrer*, 140 U.S. 545, 560, 11 S. Ct. 865, 869 (1891). "Congress cannot transfer its legislative power to the states – by nature this is nondelegable." *Knickerbocker Ice Co. v. Stewart*, 253 U.S. 149, 164, 40 S. Ct. 438, 441 (1920) (citing *Wilkerson*, 140 U.S. at 560, 11 S. Ct. at 869; *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692, 12

[11] Logically, if state legislatures were actually and constitutionally "delegated" by Congress to write the exemption provisions of the Bankruptcy Code for local debtors, there is no reason why they could not provide that a local debtor in bankruptcy could exempt *all* of his property, guaranteeing his trustee would have nothing to administer for his creditors. Conversely, an alleged "delegate" legislature theoretically could provide that the general state exemptions were completely denied to bankruptcy debtors and, by "opting out," leave bankruptcy debtors in their states with no exemptions at all.

S. Ct. 495, 504 (1892); *Buttfield v. Stranahan*, 192 U.S. 470, 496, 24 S. Ct. 349, 355 (1904); *Butte City Water Co. v. Baker*, 196 U.S. 119, 126, 25 S. Ct. 211, 213 (1905); *Interstate Commerce Comm'n v. Goodrich Transit Co.*, 224 U.S. 194, 214, 32 S. Ct. 436, 441 (1912)).

The *Knickerbocker Ice* decision is especially instructive. That case involved federal maritime law which, like the law on "Bankruptcies," is reserved under the Constitution to the United States. The Supreme Court stated that "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Knickerbocker Ice*, 253 U.S. at 158, 405 S. Ct. at 439 (quoting *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 215, 37 S. Ct. 524, 528 (1917). The Court then found that Congress had attempted to delegate a portion of its legislative function by authorizing states to enact workers compensation laws applicable in maritime proceedings. Because the Court recognized that maritime law was within the sole power of Congress, the power could not be constitutionally delegated.

> The subject was entrusted to it [Congress] to be dealt with according to its discretion – not for delegation to others. To say that, because Congress could have enacted a compensation act applicable to maritime injuries, it could authorize the states to do so, as they might desire, is false reasoning. Moreover, such an authorization would inevitably destroy the harmony and

> uniformity which the Constitution not only contemplated, but actually established – it would defeat the very purpose of the grant.
>
> Congress cannot transfer its legislative power to the states – by nature this is nondelegable.

Knickerbocker Ice, 253 U.S. at 164, 40 S. Ct. at 441 (citation omitted).

To interpret 11 U.S.C. § 522 as a conscious delegation by Congress of its exclusive power to enact bankruptcy laws would render a portion of § 522 of the Bankruptcy Code unconstitutional. "The fundamental precept of the delegation doctrine is that the lawmaking function belongs to Congress, U.S. Const. art. I, § 1, and may not be conveyed to another branch or entity." *Loving v. United States,* 517 U.S. 748, 758, 116 S. Ct. 1737, 1744 (1996) (citing *Field v. Clark,* 143 U.S. 649, 692, 12 S. Ct. 495, 504 (1892). "As Hamilton, Story, and the other early interpreters make clear, the uniformity provision [of the Bankruptcy Clause] was intended to grant exclusive power to the federal government." *Hood v. Tennessee Student Assistance Corp. (In re Hood),* 319 F.3d 755, 765 (6th Cir. 2003), *aff'd and remanded,* 541 U.S. 440, 124 S. Ct. 1905 (2004).

This court recognizes, as noted above, that before declaring § 522 to be unconstitutional, "every reasonable presumption must be indulged in favor of the validity of such enactment." *Sweet v. Reche*, 159 U.S. 380, 392-93, 16 S. Ct. 43, 46 (1895). If 11 U.S.C.

§ 522 is read narrowly as authorizing only those non-federal exemptions that states extend generally to debtors within their jurisdiction, the constitutional question is avoided. Section 522 of the Bankruptcy Code certainly does not *explicitly* state that Congress is delegating to the states the right to enact the federal bankruptcy laws. This court declines to find that Congress implicitly did so by passing § 522.

This court agrees with the compelling explanation that:

> Put differently, it is within Congress' discretion under the Bankruptcy Clause to decide what is to be the set of exemptions available to debtors seeking bankruptcy relief. Congress can create its own scheme. It can establish more than one scheme. It can reference state law for purposes of defining the scheme it has chosen ... What Congress cannot do under the Constitution is delegate ... to the states, or to any other entity the power to actually decide what is to be the appropriate scheme. That power is reserved under the [United States] Constitution for the exclusive exercise of Congress.

In re Wallace, 347 B.R. at 635.

In enacting § 600.5451, the Michigan Legislature attempted to write a portion of the Bankruptcy Code. Congress is constitutionally prohibited from delegating its "Bankruptcy Power"

to any state, including Michigan. Because Michigan passed bankruptcy specific exemptions without authority to do so, those exception statutes are unconstitutional.[12]

B. *May Congress Adopt "Non-Uniform" Bankruptcy Laws*?

A second, and equally compelling, reason exists why the Michigan statute is unconstitutional.

The Bankruptcy Clause of the Constitution grants Congress the power to "establish ... *uniform* Laws on the subject of Bankruptcies throughout the United States." The Bankruptcy Clause, U.S. Const. art. I, § 8, cl. 4. (emphasis added). Relying on an older Supreme Court decision, the Sixth Circuit has recently noted:

> What distinguishes these "peculiar terms" from the other Article I powers is the concept of uniformity, which, as Chief Justice Marshall noted nearly two centuries ago, "deserve[s] notice. Congress is not authorized merely to pass laws, the operation of which shall be uniform, but instead to establish uniform laws on the subject [of bankruptcy] throughout the United

[12] However, the court recognizes that a state's *general* exemption statutes are not unconstitutional when that state's exemption statutes are adopted under 11 U.S.C. § 522. In such an instance, a state is not infringing the Bankruptcy Clause by adopting any constitutionally-prohibited specific bankruptcy exemption statute.

> States." *Sturges v. Crowninshield*, 17 U.S. (4 Wheat.) 122, 193-94, 4 L. Ed. 529 (1819).

Schultz v. United States, 529 F.3d 343, 350 (6th Cir. 2008). Therefore, whether a bankruptcy law is passed directly by Congress or passed indirectly by the Michigan Legislature, assertedly as the "delegate" of Congress, such law must be "uniform" to be constitutional. Section 600.5451, and indeed all other "bankruptcy specific" state legislation, fails the uniformity requirement.

The predecessor of the current Bankruptcy Code was the Bankruptcy Act of 1898. That act contained no federal exemptions but, rather, allowed to bankrupts "the exemptions which are prescribed by the state laws in force at the time of the filing of the petition in the state wherein they [the debtors] have had their domicile for ... six months .... " Bankruptcy Act of 1898, ch. 541, § 6, 30 Stat. 544. Almost immediately after the effective date of the old Bankruptcy Act, it was argued that the exemption provision was incompatible with the rule of uniformity. *HanoverNat'l Bank v. Moyses*, 186 U.S. 181, 188, 22 S. Ct. 857, 860-61 (1902) ("*Hanover*"). Rejecting the argument, the Supreme Court addressed the uniformity rule and established that "uniformity" within the bankruptcy context is geographic uniformity.

> The laws passed on the subject must, however, be uniform throughout the United States, but that uniformity is geographical, and not personal, and we

> do not think that the provision of the act of 1898 as to exemptions is incompatible with the rule.

Id.

This concept of geographical uniformity has consistently been applied since *Hanover* to interpret the validity of provisions of the 1898 Bankruptcy Act and the current Bankruptcy Code. *See, e.g., Railway Labor Executives' Ass'n v. Gibbons*, 455 U.S. 457, 409, 102 S. Ct. 1169 (1982); *Schultz*, 529 F.3d at 350-51.

Most importantly, however, the Supreme Court has given a precise holding of the interpretation of constitutional uniformity:

> We concur in this view, and *hold* that the system is, in the constitutional sense, uniform throughout the United States, *when the trustee takes in each state whatever would have been available to the creditor if the bankrupt[cy] law had not been passed.*

Hanover, 186 U.S. at 190, 22 S. Ct. at 861 (emphasis added). The Michigan statute, § 600.5451, and all other "bankruptcy specific" state exemption schemes, accomplishes the opposite result. *Their very purpose is to ensure that the bankruptcy trustee does not take whatever property "would have been available to the creditor" outside of bankruptcy.*

Applying the Supreme Court's holding to this case, the Debtor is unmarried and she has elected state exemptions. On her schedules, she values the property as $70,000, subject to liens totaling $26,415, for an apparent net equity of $43,585.[13] Outside of bankruptcy, a creditor could reach $40,085 of the Property's value (the net equity less the $3,500 general homestead exemption pursuant to the Michigan Constitution). However, if the bankruptcy specific exemption in § 600.5451 applies, the Trustee may reach only $11,685 of the Property's value (the net equity less the claimed bankruptcy specific homestead exemption of $31,900). Further, if the Debtor was sixty-five years old or more, or disabled, § 600.5451 would prevent the Trustee from reaching *any* of the otherwise nonexempt value of the property. Section 600.5451 prevents a trustee from taking the same property "available to a creditor" outside a bankruptcy case. This is a direct contravention of the Supreme Court's holding in *Hanover*.

The continuing validity of the Supreme Court's decision in *Hanover* cannot be questioned or distinguished by this court. The exact language quoted above from *Hanover* was very recently cited by the Sixth Circuit Court of Appeals. *Schultz,* 529 F.3d at 351 (citing *Hanover* in support of holding that BAPCPA "means test" does not violate uniformity requirement despite fact that calculations are based, in part, on state and county where debtor resides).

---

[13] Only for purposes of this opinion, the court accepts the Debtor's schedules which have not been challenged by the Trustee or any other of the Debtor's creditors.

The Sixth Circuit has repeatedly cautioned that the power to pass bankruptcy laws is granted to Congress exclusively and "[b]y granting the power to Congress exclusively, the Constitution prevented runaway states from defeating bankruptcy's goals." *In re Hood*, 319 F.3d at 764-65. Also,

> [A]t the time of the Constitutional Convention, the fear was not, at least in the bankruptcy context, of Congress discriminating in favor of or against a particular locality. Quite to the contrary, uniformity in the Bankruptcy Clause was viewed as a way to safeguard the nation's interest in establishing and maintaining a single system of debt and credit without interference from the parochial or otherwise obstreperous action on the part of the fifty states.

Schultz, 529 F.3d at 355 (citation omitted). Allowing the Michigan legislature, or any other state legislature, to pass "bankruptcy specific" exemption schemes would be to approve the "interference" and "parochial or otherwise obstreperous action" that the Supreme Court and the Sixth Circuit have prohibited.

Bankruptcy serves two competing purposes – it is both a debtor's right and a creditor's remedy. *Patel v. Shamrock Floorcovering Servs., Inc.* (*In re Patel*), 565 F.3d 963, 967 (6th Cir. 2009); *see* Thomas H. Jackson, *The Logic & Limits of Bankruptcy Law*, 4 (1986) ("Bankruptcy law historically has done two

things: allowed for some sort of a financial fresh start for individuals and provided creditors with a compulsory and collective forum to sort out their relative entitlements to a debtor's assets."). For this reason, all bankruptcy acts enacted by Congress have contained involuntary bankruptcy provisions whereby debtors may be forced into bankruptcy by their creditors. 11 U.S.C. § 303. If § 600.5451 is constitutional, one obvious result is that creditors would be penalized for exercising their specific right granted by Congress to file an individual's involuntary case. Bankruptcy specific exemptions might be an extreme disincentive which would effectively hinder creditors' rights. "[A]ny state legislation which frustrates the full effectiveness of federal law is rendered invalid by the Supremacy Clause." *Perez v. Campbell*, 402 U.S. 637, 652, 91 S. Ct. 1704, 1712 (1971). "States may not pass or enforce laws to interfere with or complement the Bankruptcy Act or to provide additional or auxiliary regulations." *International Shoe Co. v. Pinkus*, 278 U.S. 261, 265, 49 S. Ct. 108, 110 (1929). A bankruptcy specific exemption, including § 600.5451, constitutes "obstreperous" state legislation which "frustrates the full effectiveness of federal law."

V. CONCLUSION.

Based upon Supreme Court and Sixth Circuit Court of Appeals decisions, this court opines that the "bankruptcy specific" exemptions, including § 600.5451, promulgated by the Michigan Legislature are unconstitutional, invalid and unenforceable against bankruptcy trustees. The Trustee's objection to the Debtor's bankruptcy specific exemption is

sustained. The Debtor shall have thirty (30) days from the date of this opinion to amend her exemptions.

An order shall be entered accordingly.

Dated this 22nd day of December, 2009
at Grand Rapids, Michigan

/s/ James D. Gregg
Honorable James D. Gregg
Chief United States Bankruptcy Judge

MOTION FILED
NOV 23 2009

No. 09-481 (3)

In The
Supreme Court of the United States

MARTIN PATRICK SHEEHAN, TRUSTEE,

Petitioner,

v.

SCOTT LEMOYNE JACKSON,
THE STATE OF WEST VIRGINIA,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

BRIEF OF AMICUS CURIAE, ROGER SCHLOSSBERG, MORRIS L. HORWITZ, AND JILL L. FORD, EACH CHAPTER 7 PANEL TRUSTEES, INDIVIDUALLY, IN SUPPORT OF THE PETITIONER

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NO. 09-481

IN THE SUPREME COURT OF THE UNITED STATES

MARTIN PATRICK SHEEHAN, TRUSTEE,

Petitioner,

SCOTT LEMOYNE JACKSON,
THE STATE OF WEST VIRGINIA,

Respondents.

Motion to File an Amicus Curiae Brief in Support of the Petitioner

Now comes Roger Schlossberg, Esq., on behalf of Roger Schlossberg, Morris Horwitz, and Jill L. Ford, each of whom are Chapter 7 Panel Trustees and moves this Court to permit the filing of the attached amicus curiae brief in support of Petitioner, Martin P. Sheehan, Esquire, Trustee of the Bankruptcy Estate of Scott Lemoyne Jackson. In support of this motion, the amicus asserts as follows:

1. Each of the Trustees are interested in the outcome of this case because it contains an issue of concern to each of them in their capacity as Chapter 7 Panel Trustees.

List of All Parties to the Proceeding

The parties to this proceeding are all listed in the caption.

The amicus curiae are Roger Schlossberg, Morris L. Horwitz, and Jill L. Ford. Each is a member of a panel of trustees appointed by a United States Trustee pursuant to 28 U.S.C. § 586(a)(1). Mr. Schlossberg is a member of the panel for the United States Bankruptcy Court for the District of Maryland. Mr. Horwitz is a member of the panel for the United States Bankruptcy Court for the Western District of New York. Ms. Ford is a member of the panel for the District of Arizona.

Maryland, New York and California are States, like West Virginia, whose laws provide debtors with exemptions, applicable only in the bankruptcy context and not in proceedings to enforce judgements in state court proceedings. Mr. Schlossberg, Mr. Horwitz, and Mr. Speier are frequently confronted with exemptions under the laws of the State in which they serve as trustees. Ms. Ford has had to confront California exemptions as part of her service as a trustee in Arizona. She objected to the use of a California bankruptcy only exemption scheme that was claimed in Arizona in In re: Regevig, 389 B.R. 736 (Bankr. D. Ariz. 2008). She prevailed on her objection. The California bankruptcy-only scheme was held to have been preempted. This is the opposite conclusion to that reached by the United States Court of Appeals for the Fourth Circuit in the instant case.

Reaching the issues presented by the petition, which asserts such statutes have been preempted, and are otherwise unconstitutional, would assist each of the amici in bankruptcy proceedings in each of their respective jurisdictions.

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Interests of the Amicus Curiae[1]

The amicus curiae are Roger Schlossberg, Morris L. Horwitz, and Jill L. Ford. Each is a member of a panel of trustees appointed by a United States Trustee pursuant to 28 U.S.C. § 586(a)(1). Mr. Schlossberg is a member of the panel for the United States Bankruptcy Court for the District of Maryland. Mr. Horwitz is a member of the panel for the United States Bankruptcy Court for the Western District of New York. Ms. Ford is a member of the panel for the District of Arizona.

Maryland, New York and California are States, like West Virginia, whose laws provide to debtors, exemptions, applicable only in the bankruptcy context,[2] and not in proceedings to enforce judgements in state court proceedings. Mr. Schlossberg and Mr. Horwitz are frequently confronted with exemptions under the laws of the State in which they serve as trustees. Ms. Ford has had to confront California exemptions as part of her service as a trustee in Arizona. She objected to the use of a California bankruptcy only exemption scheme that was claimed in Arizona in In re: Regevig, 389 B.R. 736 (Bankr. D. Ariz. 2008). She

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[1]No party has made a financial contribution to the preparation of this brief other than the named amici. Roger Schlossberg is the sole author of this Brief. A motion for Leave to file the Brief of Amicus Curiae will be filed contemporaneously with the Brief.

[2] Md. Code Ann., Cts. and Jud. Proc. Art., § 11-504 (f); New York Debtor and Creditor § 282; and, California Code of Civil Procedure § 703.140(b)

prevailed on her objection. The California bankruptcy-only scheme was held to have been preempted. This is the opposite conclusion to that reached by the United States Court of Appeals for the Fourth Circuit in the instant case.

Reaching the issues presented by the petition, which asserts such statutes have been preempted, and are otherwise unconstitutional, would assist each of the amici in bankruptcy proceedings in each of their respective jurisdictions.

Citations of the Official and Unofficial Opinions and Orders

The decision of the United States Court of Appeals for the Fourth Circuit in the proceedings below were made as part of a series of consolidated proceedings involving eight specific cases joined under case no. 08-2202(L). The instant case was docketed at the Court of Appeals as case no. 08-2205. The opinion below was published and is reported a Sheehan v. Peveich, 574 F.3d 248 (4th Cir. 2009)

The decision of the United States Bankruptcy Court for the Northern District of West Virginia was made as part of a series of consolidated proceedings in twenty-three cases joined under lead case no. 5:08-bk-00519, In re: Morell. The instant case was individually docketed at case no. 5:08-bk-00454. The opinion of the Bankruptcy Court was published, and is reported as In re: Morrell, 394 B.R. 405 (Bankr. N.D. W.Va. 2008). The opinion in the Morrell case was cited in the order entered in In re: Scott LeMoyne Jackson, 5:08-bk-00454.

Concise Statement of the Basis for Jurisdiction

Judgement was rendered by the United States Court of Appeals for the Fourth Circuit on July 24, 2009. There was no request for a rehearing.

This court has jurisdiction for consideration of a petition for certiorari pursuant to 28 U.S.C. § 1254(1).

The instant case constitutes a challenge to the constitutionality of a state statute, W.Va. Code § 38-10-4. The Attorney General of the State of West Virginia was notified of the challenge to that statute in the Bankruptcy Court. At that time, the Attorney General chose to intervene in the case, and the State of West Virginia is now a party to the proceedings.

Constitutional and Statutory Provisions at Issue

Article I, Section 8, Clause 4

> The Congress shall have Power
>
> . . . .
>
> To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

Article I, Section 10

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts. . . .

Article VI

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

11 U.S.C. § 522

> (a) In this section -
>
> > (1) "dependent" includes spouse, whether or not actually dependent; and
> >
> > (2) "value" means fair market value as of the date of the filing of the petition or, with respect to property that becomes property of the estate after such date, as of the date such property becomes property of the estate.
>
> (b) (1) Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate the property listed in either

paragraph (2) or, in the alternative, paragraph (3) of this subsection. In joint cases filed under section 302 of this title and individual cases filed under section 301 or 303 of this title by or against debtors who are husband and wife, and whose estates are ordered to be jointly administered under Rule 1015(b) of the Federal Rules of Bankruptcy Procedure, one debtor may not elect to exempt property listed in paragraph (2) and the other debtor elect to exempt property listed in paragraph (3) of this subsection. If the parties cannot agree on the alternative to be elected, they shall be deemed to elect paragraph (2), where such election is permitted under the law of the jurisdiction where the case is filed.

(2) Property listed in this paragraph is property that is specified under subsection (d), unless the State law that is applicable to the debtor under paragraph (3)(A) specifically does not so authorize.

(3) Property listed in this paragraph is -

> (A) subject to subsections (o) and (p), any property that is exempt under Federal law, other than subsection (d) of this section, or

State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 730 days immediately preceding the date of the filing of the petition or if the debtor's domicile has not been located at a single State for such 730-day period, the place in which the debtor's domicile was located for 180 days immediately preceding the 730-day period or for a longer portion of such 180-day period than in any other place;

(B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law; and ;

(C) retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986. If the effect of the

domiciliary requirement under subparagraph (A) is to render the debtor ineligible for any exemption, the debtor may elect to exempt property that is specified under subsection (d).

(4) For purposes of paragraph (3)(C) and subsection (d)(12), the following shall apply:

(A) If the retirement funds are in a retirement fund that has received a favorable determination under section 7805 of the Internal Revenue Code of 1986, and that determination is in effect as of the date of the filing of the petition in a case under this title, those funds shall be presumed to be exempt from the estate.

(B) If the retirement funds are in a retirement fund that has not received a favorable determination under such section 7805, those funds are exempt from the estate if the debtor demonstrates that -

(i) no prior determination to the contrary has been made by a court or the Internal Revenue Service; and

(ii) (I) the retirement fund is in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986; or

(II) the retirement fund fails to be in substantial compliance with the applicable requirements of the Internal Revenue Code of 1986 and the debtor is not materially responsible for that failure.

(C) A direct transfer of retirement funds from 1 fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986, under section 401(a)(31) of the Internal Revenue Code of 1986, or otherwise, shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such direct transfer.

(D)(i) Any distribution that qualifies as an eligible rollover distribution within the meaning of section 402(c) of the Internal Revenue Code of 1986 or that is described in

clause (ii) shall not cease to qualify for exemption under paragraph (3)(C) or subsection (d)(12) by reason of such distribution.

(ii) A distribution described in this clause is an amount that -

(I) has been distributed from a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986; and

(II) to the extent allowed by law, is deposited in such a fund or account not later than 60 days after the distribution of such amount.

(c) Unless the case is dismissed, property exempted under this section is not liable during or after the case for any debt of the debtor that arose, or that is determined under section 502 of this title as if such debt had arisen, before the commencement of the case, except -

(1) a debt of a kind specified in paragraph (1) or (5) of section 523(a)

(in which case, notwithstanding any provision of applicable nonbankruptcy law to the contrary, such property shall be liable for a debt of a kind specified in section 523(a)(5));

(2) a debt secured by a lien that is -

(A)(i) not avoided under subsection (f) or (g) of this section or under section 544, 545, 547, 548, 549, or 724(a) of this title; and

(ii) not void under section 506(d) of this title; or

(B) a tax lien, notice of which is properly filed;

(3) a debt of a kind specified in section 523(a)(4) or 523(a)(6) of this title owed by an institution-affiliated party of an insured depository institution to a Federal depository institutions regulatory agency acting in its capacity as conservator, receiver, or liquidating agent for such institution; or

(4) a debt in connection with fraud in the obtaining or providing of any scholarship, grant, loan, tuition, discount, award, or other financial assistance for purposes of financing

an education at an institution of higher education (as that term is defined in section 101 of the Higher Education Act of 1965 (20 U.S.C. 1001)).

(d) The following property may be exempted under subsection (b)(2) of this section:

(1) The debtor's aggregate interest, not to exceed $15,000 in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence, or in a burial plot for the debtor or a dependent of the debtor.

(2) The debtor's interest, not to exceed $2,400 in value, in one motor vehicle.

(3) The debtor's interest, not to exceed $400 in value in any particular item or $8,000 in aggregate value, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops, or musical instruments, that are held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(4) The debtor's aggregate interest, not to exceed $1,000 in value, in jewelry held primarily for the personal, family, or household use of the debtor or a dependent of the debtor.

(5) The debtor's aggregate interest in any property, not to exceed in value $800 plus up to $7,500 of any unused amount of the exemption provided under paragraph (1) of this subsection.

(6) The debtor's aggregate interest, not to exceed $1,500 in value, in any implements, professional books, or tools, of the trade of the debtor or the trade of a dependent of the debtor.

(7) Any unmatured life insurance contract owned by the debtor, other than a credit life insurance contract.

(8) The debtor's aggregate interest, not to exceed in value $8,000 less any amount of property of the estate transferred in the manner specified in section 542(d) of this title, in any accrued dividend or interest under, or loan value of, any unmatured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(9) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(10) The debtor's right to receive -

(A) a social security benefit, unemployment compensation, or a local public assistance benefit;

(B) a veterans' benefit;

(C) a disability, illness, or unemployment benefit;

(D) alimony, support, or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(E) a payment under a stock bonus, pension, profitsharing, annuity, or similar plan or contract on account of illness, disability, death, age, or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, unless –

(i) such plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under such plan or contract arose;

(ii) such payment is on account of age or length of service; and

(iii) such plan or contract does not qualify under section 401(a), 403(a), 403(b), or 408 of the Internal Revenue Code of 1986.

(11) The debtor's right to receive, or property that is traceable to -

(A) an award under a crime victim's reparation law;

(B) a payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(C) a payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of such individual's death, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(D) a payment, not to exceed $15,000, on account of personal

> bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent; or
>
> (E) a payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor.
>
> (12) Retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A. 414, 457, or 501(a) of the Internal Revenue Code of 1986.

. . . .

W.Va. Code § 38-10-4. Exemptions of property in bankruptcy proceedings.

Pursuant to the provisions of 11 U.S.C. §522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d).

Any person who files a petition under the federal bankruptcy law may exempt from property of

the estate in a bankruptcy proceeding the following property:

(a) The debtor's interest, not to exceed twenty-five thousand dollars in value, in real property or personal property that the debtor or a dependent of the debtor uses as a residence, in a cooperative that owns property that the debtor or a dependent of the debtor uses as a residence or in a burial plot for the debtor or a dependent of the debtor: Provided, That when the debtor is a physician licensed to practice medicine in this state under article three or article fourteen, chapter thirty of this code, and has commenced a bankruptcy proceeding in part due to a verdict or judgment entered in a medical professional liability action, if the physician has current medical malpractice insurance in the amount of at least one million dollars for each occurrence, the debtor physician's interest that is exempt under this subsection may exceed twenty-five thousand dollars in value but may not exceed two hundred fifty thousand dollars per household.

(b) The debtor's interest, not to exceed two thousand four hundred dollars in value, in one motor vehicle.

(c) The debtor's interest, not to exceed four hundred dollars in value in any particular item, in household furnishings, household goods, wearing apparel, appliances, books, animals, crops or musical instruments that are held primarily for the personal, family or household use of the debtor or a dependent of

the debtor: Provided, That the total amount of personal property exempted under this subsection may not exceed eight thousand dollars.

(d) The debtor's interest, not to exceed one thousand dollars in value, in jewelry held primarily for the personal, family or household use of the debtor or a dependent of the debtor.

(e) The debtor's interest, not to exceed in value eight hundred dollars plus any unused amount of the exemption provided under subsection (a) of this section in any property.

(f) The debtor's interest, not to exceed one thousand five hundred dollars in value, in any implements, professional books or tools of the trade of the debtor or the trade of a dependent of the debtor.

(g) Any unmeasured life insurance contract owned by the debtor, other than a credit life insurance contract.

(h) The debtor's interest, not to exceed in value eight thousand dollars less any amount of property of the estate transferred in the manner specified in 11 U.S.C. § 542(d), in any accrued dividend or interest under, or loan value of, any unmeasured life insurance contract owned by the debtor under which the insured is the debtor or an individual of whom the debtor is a dependent.

(i) Professionally prescribed health aids for the debtor or a dependent of the debtor.

(j) The debtor's right to receive:

(1) A social security benefit, unemployment compensation or a local public assistance benefit;

(2) A veterans' benefit;

(3) A disability, illness or unemployment benefit;

(4) Alimony, support or separate maintenance, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(5) A payment under a stock bonus, pension, profit sharing, annuity or similar plan or contract on account of illness, disability, death, age or length of service, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor, and funds on deposit in an individual retirement account (IRA), including a simplified employee pension (SEP) regardless of the amount of funds, unless:

(A) The plan or contract was established by or under the auspices of an insider that employed the debtor at the time the debtor's rights under the plan or contract arose;

(B) The payment is on account of age or length of service;

(C) The plan or contract does not qualify under Section 401(a), 403(a), 403(b), 408 or 409 of the Internal Revenue Code of 1986; and

(D) With respect to an individual retirement account, including a simplified employee pension, the amount is subject to the excise tax on excess contributions under Section 4973 and/or Section 4979 of the Internal Revenue Code of 1986, or any successor provisions, regardless of whether the tax is paid.

(k) The debtor's right to receive or property that is traceable to:

(1) An award under a crime victim's reparation law;

(2) A payment on account of the wrongful death of an individual of whom the debtor was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(3) A payment under a life insurance contract that insured the life of an individual of whom the debtor was a dependent on the date of the individual's death, to the extent reasonably necessary

for the support of the debtor and any dependent of the debtor;

(4) A payment, not to exceed fifteen thousand dollars on account of personal bodily injury, not including pain and suffering or compensation for actual pecuniary loss, of the debtor or an individual of whom the debtor is a dependent;

(5) A payment in compensation of loss of future earnings of the debtor or an individual of whom the debtor is or was a dependent, to the extent reasonably necessary for the support of the debtor and any dependent of the debtor;

(6) Payments made to the prepaid tuition trust fund or to the savings plan trust fund, including earnings, in accordance with article thirty, chapter eighteen of this code on behalf of any beneficiary.

Statement of the Case

The Amicus Curiae adopt the Statement of the Case in the Petition for a Writ of Certiorari.

Statement of Facts

The Amicus Curiae adopt the Statement of the Case in the Petition for a Writ of Certiorari.

Summary of the Argument

The opinion below declares Congress authorized States to enact exemption schemes that would only operate in bankruptcy proceedings without any analysis of language of the Bankruptcy Code. It is inconsistent with other opinions, including that of the United States Court of Appeals for the Ninth Circuit, and numerous bankruptcy courts, as the opinion itself recognizes. The result reached is inconsistent with the view of the leading treatise on bankruptcy law.

The portion of bankruptcy law existing in the pre-Code version of bankruptcy law permitting use of non-bankruptcy exemptions is linguistically similar to the language contained in the Bankruptcy Code permitting use of non-bankruptcy exemptions. Inferring a grant of authority to States from such a change in the relevant language is inconsistent with the analysis done in BFP v. Resolution Trust Corp., 511 U.S. 531 (1994), concerning the vitality of pre-Code practices. The result is inconsistent with legislative history prepared in connection with the adoption of the Bankruptcy Code reflecting an intention to eliminate property rights arising from the filing of a bankruptcy petition.

The issue involved has widespread implications and is important to the administration of the Bankruptcy Code.

Argument

A.

Not only is the ruling of the United States Court of Appeals inconsistent with numerous other Court, see Sheehan v. Peveich, 574 F.3d 248, 251 n. 2 (4th Cir. 2009), it is also inconsistent with the leading treatise on bankruptcy law. Collier on Bankruptcy (15th revised edition) ¶ 522.02[4] recognizes that 11 U.S.C. § 522(b)(2) authorizes States to deny debtors access to the exemptions established in § 522(d). To accomplish this objective a State must only prohibit the selection of an exemption under the federal statute. The first sentence of W.Va. Code § 38-10-4 achieves this objective. It reads: "Pursuant to the provisions of 11 U.S.C. § 522(b)(1), this state specifically does not authorize debtors who are domiciled in this state to exempt the property specified under the provisions of 11 U.S.C. § 522(d)."

The Colliers treatise goes on to observe that;

> In some instances, though, states have gon farther than prohibiting debtors' selection of exemptions under section 522(d). In some states, the property debtors may claim as exempt in bankruptcy proceedings differs from that which they may claim as exempt outside of bankruptcy. . . .
>
> Arguably these provisions are analytically distinct from those statutes that opt out of the federal bankruptcy

> exemption scheme. These provisions operate only in the event of a bankruptcy proceeding. Therefore, exemptions in those states are not even internally uniform and may be susceptible to objection on that ground. Furthermore, these enactments may be vulnerable to attack on the grounds that they are bankruptcy provisions rather than exemption provisions. . . . Section 522(b)(2) does not authorize the states to enact bankruptcy laws.
>
> Once a state has properly opted out of the federal exemption scheme, section 522(b)(3) authorizes the selection of exemptions under other federal law and pursuant to "State or local law that is applicable on the date of the filing of the petition. Since bankruptcy is federal law, a statute that would only operate in a bankruptcy proceeding is arguably not a "State or local law." Therefore, state exemptions that apply only in bankruptcy proceedings should not fall under the authorizing language of section 522(b)(3). These bankruptcy-sparked state exemption provisions have been successfully challenged in several recent cases.

Id. at Collier on Bankruptcy (15th revised edition) ¶ 522.02[4](footnotes omitted).

The decision of the United States Court of Appeals in Sheehan v. Peveich, 574 F.3d 248 (4th Cir.

2009), which Petitioner seeks to have reviewed, declares a different result without any analysis of the statute.

B.

In BFP v. Resolution Trust Corp., 511 U.S. 531 (1994) both the majority and the dissent agreed that, in adopting the Bankruptcy Code, Congress had no obligation to expressly override historical practices. Compare 511 U.S. at 546 with 511 U.S. at 566. The agreement extended to the notion that where repeal by implication had been unambiguously accomplished, then judicial recognition of change was required.

It is plain that some change in exemption law was effected when Congress permitted, under what is now 11 U.S.C. § 522(b)(1), a choice between the exemptions previously available under state law and non-bankruptcy federal law, and the newly created federal scheme of exemption contained in 11 U.S.C. § 522(d). However, the non-bankruptcy law alternative continued the scheme previously contained in Section 6 of the Bankruptcy Act of 1898, as amended.[3] That law provided;

> This Act shall not affect the allowance to bankruptcy of the exemptions which

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[3] When enacted section 6 of the Bankruptcy Act of 1898, 30 Stat 544 permitted exemption of property exempt from execution and levy at state law. In 1938, the Chandler Act, 52 Stat 840, added exemptions under other federal laws to section 6.

> are prescribed by the laws of the United States or by the State laws in force at the time of the filing of the petition in the State wherein they have had their domicile for the six months immediately preceding the filing of the petition, or for a longer portion of such six months than in any other State: . . . .

Upon passage in 1978, the Bankruptcy Code provided in section 522(b), as follows:

> Notwithstanding section 541 of this title, an individual debtor may exempt from property of the estate either
>
> (1) property that is specified under subsection (d) of this section, unless the State Law that is applicable to the debtor under paragraph (2)(A) of this subsection specifically does not so authorize; or, in the alternative,
>
> (2) (A) any property that is exempt under Federal law, other than subsection (d) of this section, or State or local law that is applicable on the date of the filing of the petition at the place in which the debtor's domicile has been located for the 180 days immediately preceding the date of the filing of the petition, or for a longer portion of such 180-day period than in any other place; and

> (B) any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a tenant by the entirety or joint tenant to the extent that such interest as a tenant by the entirety or joint tenant is exempt from process under applicable nonbankruptcy law.

The underlined language of these two statutes reflects little variance in the choice of language between the pre-Code version of the Bankruptcy Act, and the provisions of the Bankruptcy Code. Certainly, there is nothing in these changes which might be said to authorize States to enact State exemption schemes that would only operate in the bankruptcy context.[4] Inferring such a change is inconsistent with the view of both the majority and the dissent in BFP.

With passage of the Bankruptcy Code, Congress permitted a choice between the new federal bankruptcy exemption scheme, and the traditional

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[4] Section 522 has been amended in several respects since 1978. None of those amendments have caused these central provisions of Section 522 to be eliminated, or significantly changed. Instead, the amendments have a) required joint debtors to use the same exemption scheme, b) have attempted to restrict efforts to manipulate exemptions by moving, and c) have created access to a uniform federal exemption scheme for retirement assets.

non-bankruptcy law exemption scheme. Although Congress permitted States to enact legislation which would bar access to the federal scheme, and to require use of the available non-bankruptcy law alternative, there is no reason to infer Congress intended to permit States to pass bankruptcy only exemption schemes of to supercede the new federal bankruptcy exemption scheme. Such inferences would be inconsistent with the analysis of BFP.

C.

The last minute compromise that led to adoption of section 522 caused there to be virtually no legislative history for the version of this section which became law. Consequently it is difficult to make real inquiry into the intent of Congress on the issue raised by Petitioner. Still, there is insight into a more general approach to how bankruptcy laws should function in some of the legislative history of the Bankruptcy Code.

With respect to a necessary coordinating amendment[5] to the Longshoreman and Harbor Workers' Compensation Act of 1927, 33 U.S.C. § 917, 44 Stat 1434, made in the Bankruptcy Reform Act of 1978, both the Senate Report and the House Report provide:

> Bankruptcy policy strongly favors equality of treatment of all creditors, and **strongly disfavors the creation of property rights upon the filing of a bankruptcy case**. The purpose of bankruptcy is to enforce rights that have arisen before bankruptcy, and to enforce them in an orderly liquidation process. **Springing interests unfairly defeat legitimate expectations** of

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[5] In Title III of the Bankruptcy Reform Act of 1978 Congress deleted a provision of the Longshoreman and Harbor Workers' Act that had previously provided a springing property right. That provision stated as follows:

> (a) Any person entitled to compensation under the provisions of this chapter shall have a lien against the assets of the carrier or employer for such compensation without limit of amount and shall, upon insolvency, bankruptcy or reorganization in bankruptcy proceedings of the carrier or employer, or both, be entitled to preference and priority in the distribution of the assets of such carrier or employer, or both.

> other creditors who may have relied on the absence of any such prior interests in extending credit. Section 67 of the present Bankruptcy Act and section 545 of proposed title 11 of the United States Code implement this important bankruptcy policy.

(Emphasis added.) Sen. R. 95-989, 95th Congress, Second Session, *reprinted in* U.S. Code Congressional & Administrative News at page 5950 (1978); and H.R. 95-595 95th Congress, Second Session, *reprinted in* U.S. Code Congressional & Administrative News at page 6412 (1978).

Having made an effort to eliminate springing claims, other than the exemption scheme specifically provided by Congress, it seems odd that Congress would somehow have implicitly authorized States to create such rights by passing several bankruptcy only schemes. It seems particularly unlikely since there had been no prior practice of creating bankruptcy only exemptions at State law. The only pre-Code case which attempted to have a bankruptcy only rule had been rejected in In re: Kanter, 505 F.2d 228 (9th Cir. 1974).

Conclusion

WHEREFORE, the undersigned ask that the petition for certiorari to the United States Court of Appeals for the Fourth Circuit be granted because of the division in the Courts below and because of the importance of the issue to the proper administration of bankruptcy law.

Respectfully submitted,

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